CASES

DECIDED IN THE

COURT OF SESSION,

DURING

SUMMER SESSION 1794.

COLLECTED BY APPOINTMENT OF THE

SOCIETY OF CLERKS TO THE SIGNET.

EDINBURGH:

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M, DCC, XCIV.

CASES

DECIDED IN THE

COURT OF SESSION,

DURING THE

SUMMER SESSION 1791.

TO THE HONOURABLE

ALEXANDER MURRAY

OF HENDERLAND,

SENATOR OF THE COLLEGE OF JUSTICE,

AND

ONE OF THE JUDGES OF THE HIGH COURT OF JUSTICIARY,

IN SCOTLAND.

My Lord,

WHEN at ſome leiſure hour your Lordſhip ſhall condeſcend to glance over theſe Reports of Caſes, which, as a Judge, you have already ſo fully conſidered, and ſo well explained, you will find, perhaps, much to cenſure, much omitted, and, I fear, but little to approve of: Still it will have ſome weight with your Lordſhip, that they are preſented to you by one who is earneſt in the improvement of his profeſſion; and ſhould you allow any higher value to them, it muſt give the Author more confidence in himſelf, and ſome weight with the Public.

I remain,

My Lord,

Your Lordſhip's obedient,

and very humble Servant,

Edinburgh,
5th Auguſt 1794.

ROBERT BELL.

ADVERTISEMENT.

IT may not be improper to explain here the nature and object of this Collection, and the plan on which it is to be conducted.

The Society of Clerks to the Signet, who alone are intitled to prepare the moſt important conveyances both legal and conventional, and who conſequently muſt ever form the principal body of conveyancers in this country, have, in virtue of the powers conſtitutionally veſted in them, laid down a plan of education, and preſcribed a form of trial for their candidates, which muſt enſure a liberal education, as well as profeſſional knowledge. In proſecution of this object, they have inſtituted a Courſe of Lectures upon Conveyancing, and joined with that inſtitution a Collection of Deciſions, directed more particularly to that ſubject.

When this Collection of Deciſions was authoriſed by the Society, they had under their conſideration a private Collection, in which the Names, as well as the Opinions of the Judges, were given; and it was then underſtood, that that plan was to have been followed. But a change has been thought neceſſary, the reaſon of which it is proper to explain; the more eſpecially, as few were preſent at the laſt general meeting of the Society, when the matter was again brought under conſideration by a meſſage from the Court. This meſſage intimated that the plan of the private Collection was diſapproved of by the Judges, and the Collector, by a letter addreſſed to the Depute-keeper, begged that the Society would conſider the matter unfettered by any obligation which they might conceive themſelves to lie under to him. Without deciding the point, they left it "to Mr Bell to do, with advice of a Committee, what ſhould ſeem "moſt expedient in the buſineſs." Mr Bell felt the delicacy of his ſituation, increaſed by the additional confidence which had thus been placed

placed in him. To the Committee he could not apply; for in a matter of this kind, he ſhould not have felt that any authority leſs than that of the whole Society would have been ſufficient; nor would he meanly have ſheltered the change, which he thinks it proper to make, under the ſanction of their names. This change will, he hopes, remove every objection, without hurting eſſentially the value of the Collection; and he truſts, that it will be thought neither diſhonourable nor improper in him to have given up a plan which did not meet with the approbation of the Court.

In collecting deciſions, the object is to be attained, either by giving a ſhort and clear view of the point taken up and decided by the Court, or by entering more fully into the grounds and reaſonings upon which the general opinion is formed. Of the former method, it is impoſſible to conceive finer models than are to be found in the Deciſions of Kilkerran, and of Dirleton: but that manner of collecting caſes acquires weight only from the penetrating judgement and profeſſional reputation of theſe great men; while the other plan depends upon the accuracy with which the opinions are taken down, requires only labour and perſeverance, and is a work of which every perſon preſent in the Court at the deciding of a cauſe is able to form a proper eſtimate.

The latter is therefore the plan which muſt be followed in this Collection; and the grounds of the judgements may be given, either by detailing the particular opinions of the Judges, or by ſelecting and arranging the arguments which they have uſed, ſo as to bring out a cloſe, and yet a full opinion. Each of theſe methods has its peculiar advantages: Where the opinions of the Judges are accurately given, they will afford the moſt complete conviction of the nature and principles of the deciſion: Where the other method is followed, this effect is not neceſſarily deſtroyed; for it is not merely the general reſult of the opinions that is given, but the preciſe arguments uſed by the Judges. There is therefore no greater confidence demanded from the Public in the one caſe than in the other; both muſt depend upon the accuracy with which the Opinions are taken down.

In caſes of importance, it is not merely the opinions of the Judges that are wanted: in the hurry of buſineſs, the reaſonings of the lawyers are alſo deſirable. Theſe, therefore, will be preſerved,

and

and in the material caſes ſo fully, as to render recourſe to the Seſſion-papers unneceſſary.

It has been cuſtomary in other collections, to prefix a ſhort title to each caſe; and it certainly is neceſſary, that the nature of the caſe ſhould, in ſome ſhape or other, be explained, that one may not have to wade through circumſtances, without knowing to what point the attention ſhould be directed: But it ſeems better that this ſhould be done in the firſt line of the caſe.

It further remains to be explained, why there is ſo long an interval betwixt this and the former Collection, ending in Summer-ſeſſion 1792. The explanation is this: The deciſions of that period are made up on the former plan, and make a volume by themſelves; and the Collector muſt acknowledge, that when he felt it impoſſible for him to give them to the public in that ſhape, under the patronage and name of the Society, he preferred beginning with the preſent Seſſion, leaving the fate of the former period to be decided by future circumſtances.

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CASES DECIDED

IN THE

COURT OF SESSION.

May 14. 1794. Judges Preſent.

Lord PRESIDENT,

Lords JUSTICE-CLERK, ESKGROVE, SWINTON, DREGHORN,	Lords POLKEMMET, STONEFIELD, ANKERVILLE, HENDERLAND,	Lords DUNSINNAN, ABERCROMBY, CRAIG, METHVEN.

N° I. PETITION of Mr RICHARD HOTCHKIS, Writer to the Signet.

BY § 28. of the late bankrupt-ſtatute, the creditors of a bankrupt are empowered to appoint three of their number as commiſſioners; and under this clauſe Meſſ. Hog, Jamieſon, and Maclean, three of the creditors of Bertram, Gardner, and Company, were appointed to this office. Mr Hog having declined to act, a meeting was called to renew the nomination. At this meeting a difficulty occurred as to the proper method to be followed, ſome of the creditors inſiſting that the ſingle vacancy only ſhould be filled up, while others thought a new nomination of three commiſſioners ſhould take place; and this came ultimately to be the opinion of the majority, who accordingly elected Meſſ. Wallace, Lothian, and Finlay; thoſe of a contrary opinion voting under proteſt for Mr Somervile as a ſucceſſor to the perſon reſigning. Afterwards Mr Maclean and Mr Somervile gave up all pretenſions to the office; but Mr Jamieſon, conceiving the new nomination to be irregular, declined to give his ſanction to it by a voluntary reſignation. A petition was therefore preſented by Mr Hotchkis the truſtee, praying the Court "to approve of the election of Meſſ. Alexander Wallace, Walter Lothian, and "James Finlay, as the three commiſſioners under the preſent ſequeſtration, "and to give ſuch other order in the premiſſes as to the Court ſhould ſeem "proper."

Mr Jamieſon having at the bar declined anſwering the petition, the Court confirmed the nomination.

Pringle, Clerk. Party, Agent.

N° II. Petition of Hugh Machutcheon.

MR Machutcheon having propoſed to pay a compoſition to his creditors, and more than nine-tenths in value and number having agreed to accept of the compoſition, and conſent to the withdrawing of the ſequeſtration, a petition was preſented to the Lord Ordinary on the bills, in name of the bankrupt, with conſent of the truſtee, founding on § 48. of the bankrupt-ſtatute, and upon the agreement with the creditors. Lord Polkemmet, before whom the application came, ordered intimation of it to be made in the Gazette, and on the walls of the bill-chamber. Theſe intimations were made, and no perſon appeared to object. A petition was then preſented to Lord Abercromby, as Lord Ordinary on the bills for the time, praying his Lordſhip to grant a diſcharge and exoneration. But his Lordſhip, doubting of the powers of the Lord Ordinary, a petition was given in to the Court, praying their Lordſhips "to diſpenſe with the intimation of the petition, in reſpect of the "intimation of the former one preſented to the Lord Ordinary; and, upon conſidering what has been ſtated, to pronounce an order approving of the ſaid "compoſition, and declaring the truſtee exonered, and diſcharging the petitioner of all debts contracted by him prior to the 4th December laſt, being "the date of the application for the ſequeſtration, except as to payment of the "ſaid compoſition of 10s. in the pound; or to do therein as to the Court "ſhould ſeem proper."

The Court were of opinion, that, regularly, they could not diſpenſe with the intimation, and therefore a new intimation was ordered.

David Catheart, Advocate. Thomas Adair, Agent. Home, Clerk.

N° III. Meſſ. Somervile and Company Merchants, Leith, and Thomas Stewart, Purſuers,

AGAINST

John Stein Diſtiller at Canonmills, Defender and Advocator.

IN April 1792, John Stein became bound to deliver to Mr Thomas Stewart a certain number of puncheons of aquavitæ, at the rate of twelve puncheons weekly, and at the price of 2s. 2d. per gallon: the miſſive bears, "To be payable by your acceptance (that is, the acceptance of Thomas Stew"art, under the guarantee of Meſſ. Somervile and Company,) at three months "from the date of each ſettlement, which ſhall take place at the end of each "fortnight." An acceptance of the offer contained in this letter was written by Mr Stewart; and, of the ſame date, Meſſ. Somervile and Company, by their letter, engaged that Mr Stewart ſhould implement his part of the obligation; and they add, "We become bound to ſee whatever acceptances he may "grant on this account paid, in the ſame regular manner as if we were ac-

"tually

" tually bound in them ourſelves; and if at any time you chooſe to take our " acceptances in preference to Mr Stewart's, we have no objection to grant " them."

On theſe miſſives the tranſaction proceeded; the aquavitæ was delivered, and the bills granted at the ſettlements duly retired. This was the ſtate of matters until the month of March 1793, a period of mercantile diſtreſs unparalleled in the commercial hiſtory of this country. At this time Mr Stein ſeems to have found difficulty in raiſing money on the bills of Somervile and Company; and he inſiſted, either for caſh, or bills capable of inſtantly procuring it, otherwiſe he could not proceed in the delivery of the ſpirits in terms of the agreement. At firſt Somervile and Company were deſirous of accommodating Stein; but they afterwards ſtood on their agreement: and the queſtion was, Whether, under that agreement, in which bills at a ſhort date were ſtipulated, the ſeller could, in place of theſe, demand ready money, or diſcountable bills: Mr Stein, on the one hand, contending, That his demand was conſiſtent with the practice of merchants: and that to refuſe this, and force him to continue a tranſaction, when the bills of the purchaſer were not negotiable, would be attended with the moſt dangerous conſequences; for if the ſuſpicions were juſt which had been entertained concerning the credit of the purſuers, and which had rendered it impoſſible to negotiate the bills, his ruin muſt be inevitable; whereas, to require of the other party a good and negotiable bill was, if theſe ſuſpicions were unjuſt, a matter of no difficulty. But to this Meſſ. Somervile and Company anſwered, That the terms of the agreement afforded the only rule in this caſe, and by theſe they were bound to give their own bills, without ſaying whether theſe bills were negotiable or not; and having given theſe bills, they had fulfilled their part of the agreement. They contended, That although their bankruptcy would have authoriſed Mr Stein to have withdrawn from his agreement, while they continued ſolvent he could not inſiſt for other or better ſecurity than that which he had ſtipulated in the contract: That the demand, ſo far from being conſiſtent with mercantile uſage, was quite the reverſe; for amongſt no ſet of men is a faithful performance of agreements more neceſſary. The merchant muſt be able to ſay, "So far am I bound, ſo far conſequently may I extend " my tranſactions, and ſtretch my own credit and that of my friends:"—It is upon the ſtability of one contract that he builds other contracts and other tranſactions; nor is there a ſingle merchant who, in the midſt of the complicated engagements of trade, could command caſh or new ſecurity for every bargain he has made upon credit. If ſuch demands as the preſent could be made, the whole ſyſtem of commerce would be at a ſtand.——This queſtion came originally before the Sheriff of Edinburgh; and the Sheriff having found, " That Mr Stein has no right to demand any further ſecurity during the " currency of the bills granted by Meſſ. Somervile and Company, or to re- " fuſe to implement the bargain on account of the bills not being preſently " negotiable, and having ordained him to deliver the ſpirits," &c. the queſtion was brought before the Court of Seſſion by advocation; when Lord Abercromby, as Ordinary, found, That, by the terms of the contract, Mr Stein " was not intitled to inſiſt that Meſſ. Somervile and Company ſhould enable

" him

" him to diſcount the ſaid acceptances, or to raiſe caſh upon them before the " term of payment," &c.

The firſt reclaiming petition againſt this judgement was refuſed without anſwers; but a ſecond having been appointed to be anſwered, the cauſe came this day to be conſidered by the Court.

The Court were of opinion, that as this was not a ready-money bargain, on the contrary, as Meſſ. Somervile and Company were bound, by a written agreement, to give only their own bills for the price of the ſpirits, payable at the diſtance of three months, as this was done, and the bills regularly retired, and as there was no change in the circumſtances of the parties, Mr Stein had no title to withdraw from the agreement, on account of his not being able inſtantly to raiſe money on the bills of Somervile and Company: although it was maintained by ſome of their Lordſhips who were of a different opinion, that in commercial tranſactions, where bills are ſtipulated to be given in payment, theſe bills are underſtood to be negotiable bills: a practice too which ſeems to have had the ſanction of Meſſ. Somervile and Company in their tranſactions with others, and which was peculiarly proper to be followed in this caſe, where the manufacture of the ſpirits required a great command of money.

Beſides the argument on the general point, Mr Stein put his cauſe on ſeveral ſpecialties, of which he offered a proof, thus;

1. He offered to prove, by witneſſes, that it was verbally agreed to, and was the underſtanding of parties at entering into the contract, that the bills to be given by Somervile and Company ſhould be negotiable bills. But this was rejected by the Court, as tending to defeat a written agreement by parole proof.

2. It was inſinuated, that a change had taken place in the circumſtances of Meſſ. Somervile and Company, ſufficient to authoriſe Mr Stein to with-hold performance of his part of the agreement. The Court were of opinion, that if Mr Stein would fairly and openly offer to prove, that Meſſ. Somervile and Company were bankrupt, his allegation was clearly relevant, and one which they would admit to proof; but they expreſſed very ſtrongly their diſapprobation of thoſe hints and inſinuations which had been thrown out in the papers upon a ſubject of ſo delicate a nature as mercantile credit.

3. Mr Stein offered to prove, that Mr Allan was held out to him as a partner of Somervile and Company, and that upon the faith of that he had entered into the agreement; and that it is now maintained that Mr Allan is not a partner. The Court thought the allegation, of his being fraudulently induced to believe that he was contracting with one party, when in reality he was contracting with another, was ſufficiently relevant. But then the allegation muſt be made in legal terms, and not, that Mr Allan was held up as a partner, and they were led to believe he was a partner, and ſuch like expreſſions.

The Court, as this was an Inner-houſe interlocutor, did not refuſe the petition,

tion, but before anſwer, allowed a condeſcendence * to be given in. Lord Henderland and Lord Dreghorn were in favour of Mr Stein, but no vote was put.

For Meſſ. Somervile & Co. Stein, Mat. Roſs, and Cha. Hope, Allan Maconochie and B. Bruce, Adv. Jo. Peat, Jo. Taylor, W.S. Agents.

Lord Abercromby, Ordinary. Home, Clerk.

May 15. 1794. Judges Preſent.

Lord PRESIDENT,

Lords JUSTICE-CLERK, SWINTON, DREGHORN, POLKEMMET,	Lords STONEFIELD, HENDERLAND, DUNSINNAN,	Lords ABERCROMBY, CRAIG, METHVEN.

N° IV. COMPETITION betwixt ARCHIBALD GRAHAM, Caſhier to the Thiſtle Bank in Glaſgow,

AND

GEORGE LENY of Nether Glens.

IN a multiple-poinding, brought by the truſtees of Colquhoun of Camſtroddan, as debtors to Captain Walter Graham, in the ſum of L. 187 contained in a bill payable in April 1785, there was produced for George Leny, as his intereſt, the principal bill itſelf, with an indorſation in his favour, holo-

* The Court, when they ordered this condeſcendence, took notice of the very erroneous notion which ſeemed to be generally entertained of the nature of a condeſcendence; and they thought this a proper opportunity of expreſſing their reſolution, not to allow a condeſcendence in future to contain any thing more than a mere enumeration, in regular order, of the facts offered to be proved; and that when, in place of this, a condeſcendence ſhall enter into a ſtate of the cauſe, or give a detail of the arguments, it ſhall be ordered to be withdrawn, and a fine impoſed upon the party. In another caſe (Grants againſt Stevenſons), which occurred the next day, the Court had occaſion to reconſider this ſubject, when their Lordſhips repeated their former reſolution, and extended it to all anſwers to condeſcendences, which they are to conſider as counter condeſcendences, going through the condeſcendence article by article, and admitting or denying each. The view of the Court was, in ſhort, this, that the condeſcendence and anſwers ſhould enable them to fix thoſe points on which the parties are agreed, on the one hand; and on the other, to aſcertain thoſe upon which they differ, with the mean of proof by which theſe are offered to be eſtabliſhed.

Why ſhould not this rule, ſo well fitted for the diſcovery of truth, be followed in the beginning of every cauſe, and the buſineſs of the Outer Houſe reſtricted to the mere preparation of cauſes?

No ſyſtem of laws, however excellent, can be ſupported in the opinion of a people againſt the effects of looſe, undefined, or ill-ordered forms; the party who is haraſſed by ſuſpence, or exaſperated by ſome of thoſe acts of injuſtice inſeparable from the confuſion which accompanies ſuch forms, will accuſe the law itſelf of injuſtice, or perhaps arraign the integrity of the judge.

If we ſhould perceive in our own forms a juſt cauſe of complaint, we have at leaſt this conſolation, that the evil is not imputable to the law,—that the power of regulating thoſe forms is in the hands of men whoſe knowledge and integrity make them the proper depoſitaries of ſo valuable a public truſt, and who ſhow, by their anxiety for a well-ordered courſe of juſtice, that, in due time, and in the beſt manner, they will redreſs whatever may be amiſs.

graph of himſelf, bearing date the 11th April 1789; and for the Thiſtle Bank there was produced, an arreſtment uſed on the 5th July following. Upon the 26th June 1789, Captain Walter Graham had been rendered bankrupt; and as George Leny was brother-in-law to Walter Graham, an objection was ſtated to his intereſt, founded on the act 1621: but the principal objection was, that the indorſation being holograph, it could not prove its own date; and conſequently, that the conveyance muſt be held to have been made within ſixty days of Graham's bankruptcy, and ſo ſtruck at by the act 1696. On the other hand, Mr Leny ſhowed, by tranſactions with the Stirling Bank, and by the production of bills due by Captain Graham to that bank, and retired by him, that the indorſation of the bill in queſtion was a fair and onerous tranſaction; and that it bore date within a very few days of the laſt advance for Captain Graham. There was alſo produced, a letter from one of Camſtroddan's truſtees, by which it was proved, that Mr Leny had demanded payment of the bill, in virtue of the indorſation, ſo far back as June 1789, a month prior to the time of uſing the arreſtment founded on as the intereſt of the Thiſtle Bank, conſequently, that the indorſation could not be antedated for the purpoſe of defeating that arreſtment, and muſt therefore be held to be of the date which it bears.

This queſtion came before the Court on a petition againſt a judgement of the Lord Ordinary, repelling the objection to Mr Leny's intereſt, with anſwers for Mr Leny.

It was doubted by one of the Judges, whether this bill, which had lain over for four years after the term of payment, had not loſt its privileges; but to this it was anſwered, that indorſation was undoubtedly ſtill the mode of conveyance.

It was further remarked, that by means of an indorſation to a bill, the act 1696 might be more eaſily evaded. But to this it was thought a ſufficient anſwer, that the danger ſtruck equally both ways; for if the conſequence of repelling the objection was to give an eaſy method of evading the act, the ſuſtaining it might throw looſe tranſactions ſettled by indorſations, not only during the period of ſixty days, but even for years preceding the bankruptcy.——Another queſtion came to be conſidered, Whether, if the date of the indorſation was not to be held as the true date, the interpoſition of a date did not exclude the legal preſumption of the indorſation's being of the date of the bill, and throw the *onus probandi* on the claimant? But the Court being fully perſuaded of the oneroſity and fairneſs of the tranſaction, the majority came to this opinion, That as the date of the indorſation (if that be taken as the rule) was beyond the ſixty days, and, if the indorſation be thrown aſide, as there was nothing to prevent the Court from following the legal preſumption, they muſt, in either view, hold the tranſmiſſion as not falling under the act.

The petition was unanimouſly refuſed, and the objection to Mr Leny's intereſt repelled.

For Thiſtle Bank, Mr Sol. General, J. W. Murray, } Ad. R. Trotter, C. S. }
Mr Leny, Dean of Faculty, D. Cathcart, } Ar. Tod, C. S. } Agents.
Lord Dreghorn, Ordinary. Home, Clerk.

N° V.

N° V. The INCORPORATION of WRIGHTS of the Burgh of Elgin,

AGAINST

THOMAS HUTCHIESON Merchant in Edinburgh, &c.

IN the competition which took place betwixt the parties in this cauſe, as to the right of property of a ſmall piece of garden-ground lying in the town of Elgin, there was produced for Mr Hutchieſon, miſſives of ſale by two heirs-portioners, daughters of the perſon laſt infeft. Theſe miſſives were dated in the 1739, and no title had been completed, either in Mr Hutchieſon's perſon or in the perſon of his anceſtors, to whom theſe miſſives were granted; but a conſtant poſſeſſion of the ſubject had followed upon them. The Wrights of Elgin, on the other hand, founded on the retour of a ſervice in the perſon of their author, a grandſon of the perſon laſt infeft, ſo far back as the 1770, as a link in their progreſs; and the principal point taken up by the Court was, Whether this retour was now unchallengeable, in conſequence of the lapſe of twenty years? The queſtion had originated in a ſummary removing againſt Mr Hutchieſon's tenant in the ſubject, brought by the Corporation; and a declarator of property was afterwards raiſed by Mr Hutchieſon. The Court therefore took up both the queſtion of poſſeſſion and of right: and it was the unanimous opinion of the Court, that Mr Hutchieſon had a title to the ſubjects in queſtion, from the true heirs in theſe ſubjects, which admits of being inſtantly completed, ſo as to exclude any title in the perſon of his competitors; and that the viecennial preſcription of retours is of the nature of the poſitive preſcription, and required poſſeſſion. It was alſo obſerved, that Sir George Mackenzie, in his obſervations on the ſtatute by which this preſcription is eſtabliſhed (1617. c. 13.), ſays, That "this act regulates the competition between "the ſeveral kinds of heirs among themſelves, as, Whether the heir of line "ſhould be preferred to the heir of tailzie? but it does not exclude the clear "intereſt of blood; *l.* 8. *ff. De Reg. Juris.*" This retour had not been produced; and it was uncertain whether it contained the verdict of a jury or the cognition of magiſtrates. If it had been neceſſary to have gone into this queſtion, and it had turned out to be a mere cognition, it ſeemed to be the opinion of their Lordſhips, that it would not have afforded a ſufficient title; but the inveſtigation was unneceſſary. Mr Hutchieſon was found to have the preferable right: and the Court alſo found him intitled to his expences.

For Incorporation of Wrights, Allan Maconochie, Mr Hutchieſon, Mat. Roſs, } Advocates. A. Milne, C. S. Jo. Innes, C. S. } Agents.

Lord Dreghorn, Ordinary. Gordon, Clerk.

May 16. 1794. Judges Present.

Lord President,

Lords Justice-Clerk, Swinton, Dreghorn, Polkemmet,	Lords Stonefield, Henderland, Dunsinnan,	Lords Abercromby, Craig, Methven.

N° VI. Viscount of Arbuthnot and others, Purſuers,

AGAINST

James Scott, Eſq; of Brotherton, Defender.

THE purſuers are ſuperior heritors on the river North Eſk, having rights to ſalmon fiſhings; and the defender an inferior heritor, who has alſo a right to a ſalmon-fiſhing, and to certain mills which are ſupplied with water by the means of a dam-dike. It was aſſerted by the ſuperior heritors, that the dam-dike was ſo conſtructed as to injure very materially their fiſhings, and that by certain alterations this might be prevented without any injury to the mills.

The Court, in reaſoning on the relevancy of theſe facts, were of opinion, that wherever there are rights in a river veſted in different proprietors, it is the duty of the Court to regulate the exerciſe of thoſe rights in ſuch a manner as to enable, if poſſible, each proprietor to enjoy his reſpective intereſt:—And the right of floating wood down a river, which was claimed by the Duke of Gordon, and diſputed by the inferior heritors, who were poſſeſſed of rights of cruive-fiſhing, was given as an inſtance of the proper exereiſe of this power in the Court; there the right of floating was reſtricted to that period when the cruives are taken out, by which means the rights of both heritors were preſerved, 1781, March 9. Duke of Gordon.

A condeſcendence was ordered.

For the Purſuers, Ad. Gillies, Defender, Geo. Fergulſon } Advocates. J. Adamſon. Cha. Innes, C. S. } Agents.

Lord Dreghorn, Ordinary. Home, Clerk.

N° VII. William Innes, Eſq; and his Attorney, Purſuers,

AGAINST

David Ruſſel, Accountant in Edinburgh, Defender.

JAMES SCOTT, merchant in Edinburgh, became bankrupt, and, with the concurrence of his creditors, granted a truſt-deed in favour of Mr Ruſſel, in the 1770. Under this truſt-deed, Mr Ruſſel proceeded to recover the funds of the bankrupt; and having, in the 1785, at the diſtance of fifteen years, collected part of the funds, he made a diviſion amongſt thoſe who had produced intereſts, at the rate of 4 s. in the pound of their reſpective debts. Part of the funds were affected by inhibitions and other diligences, and remained

mained undivided, when Mr Ruſſel was called in an action in the 1789, at the inſtance of Mr Innes, a creditor of Mr Scott's; who, neglecting to claim in this country, had endeavoured to attach effects in Jamaica belonging to the bankrupt, but had failed in recovering any thing there. The concluſion of the action was againſt Mr Ruſſel, for a ſum equal to the dividend which he would have drawn, had he entered his claim with the other creditors; or if it ſhould be found that Mr Ruſſel acted legally in dividing the funds, then that what remained uncollected ſhould be conveyed to the purſuer, to enable him to operate his payment.

It was the unanimous opinion of the Court, That the money which had been *bona fide* divided by Mr Ruſſel, the truſtee, and which had been received by the creditors with the ſame *bona fides*, in payment ſo far of their debts, could not now be reclaimed by the purſuer, either from Mr Ruſſel or the creditors; but with regard to the funds undivided, they conſidered Mr Innes to be intitled to claim to the extent of a dividend upon his debt equal to what had been drawn by the other creditors. The following judgement was pronounced: "Find, That the purſuer is intitled to be ranked upon the undivided funds of the bankrupt, ſo as to draw therefrom what will afford him a dividend of his debt equal to what any of the creditors have drawn; and remit," &c. *

For the Purſuers, John Dickſon, R. H. Cay, } Advocates. H. S. Mercer, W. S. R. Jamieſon, W. S. } Agents.
Defenders,
Lord Alva, Ordinary. Gordon, Clerk.

May 21. 1794. Judges Preſent.

LORD PRESIDENT,

Lords JUSTICE-CLERK, ESKGROVE, DREGHORN, POLKEMMET,	Lords ANKERVILLE, HENDERLAND, DUNSINNAN,	Lords ABERCROMBY, CRAIG, METHVEN,

N° VIII. Lieutenant JAMES GRANT,

AGAINST

JOHN, LAUCHLAN, &c. GRANTS.

IN a multiple-poinding, brought by Sir James Grant, the queſtion turned upon the interpretation of the following clauſe, in a will executed by Humphry Grant in Jamaica: "I leave and bequeath to the Reverend Mr Patrick Grant, miniſter of the goſpel at Urray, my full brother, the one third of my eſtate, real and perſonal, during his lifetime; and I deviſe the other two thirds of my eſtate, real and perſonal, to my two ſiſters Mary and Janet Grants, to be equally divided betwixt them during their lifetime; and in caſe of the deceaſe of the ſaid Mr Patrick Grant, and Mary and Janet Grants, my ſiſters aforeſaid, I deſire that two thirds of my ſaid eſtate ſhall fall and belong to the children of my eldeſt ſiſter Marjory Grant, deceaſed, procreated betwixt her and James Grant of Ballintomb, and

* See below, N° XIV.

" the remaining third of my eſtate to the children of my half-brother Mr " Patrick Grant, miniſter of Logie; and in caſe Mr Patrick Grant of Urray " leave heirs of his own body, male or female, I deviſe and leave my whole " eſtate, real and perſonal, to the ſaid heirs, after the deceaſe of my two ſiſters " aforeſaid."

Mr Patrick Grant of Urray died without leaving heirs of his body, ſo that the right of two thirds of the teſtator's eſtate came to the heirs of the body of Marjory Grant. Marjory had three children, Lieutenant James Grant, one of the parties in this cauſe; Janet Grant, mother of John, Lauchlan, &c. Grants, the other parties in this cauſe; and ſhe had a ſon, John Grant, who ſurvived Patrick Grant of Urray, but predeceaſed, (without children), the two life-rentrixes. The queſtion, therefore, was, Whether one third of the legacy to the heirs of Marjory had veſted in John Grant, as one of the three heirs of Marjory, in conſequence of his having ſurvived Patrick Grant of Urray; if ſo, then it muſt, upon his death, have deſcended to Lieutenant James Grant his brother; whereas, if it was not to be conſidered as veſted in John, then, in place of going ſolely to his brother James Grant, it muſt have divided equally betwixt James and the children of his ſiſter Janet, the other party in this cauſe.—Lord Craig, the Ordinary before whom this queſtion came, ranked and preferred the two parties in the cauſe equally on the fund *in medio*. And to this judgement the Court adhered.

It was obſerved by one of their Lordſhips, That this was one of thoſe caſes which are to be decided ſolely upon the intention of the teſtator, as appearing from his will; and which can give little aſſiſtance in deciding any other queſtion. The caſe was taken up in this way by the Court,—The teſtator having given the eſtate to Mary and Janet Grants during their lifetime, and upon their death, and the death of Mr Patrick Grant without children, two thirds of it to the children of Marjory Grant, the only queſtion is, Whether by the children of Marjory the teſtator meant thoſe children only who were alive when the ſucceſſion opened by the death of the laſt liferenter? and it was the general opinion, that thoſe only who were then alive were meant. The caſe of Burnet againſt Burnet, 17th December 1736, reported in the firſt volume of the Dictionary, p. 303. was quoted by one of their Lordſhips as a caſe preciſely in point.

For James Grant, John, Lauchlan, &c. Grants, } Mat. Roſs, A. Elphinſton, } Advocates. Ja^s. Saunders, C. S. Ad. Stewart, } Agents.
Lord Craig, Ordinary. Menzies, Clerk.

N° IX. JOHN THOMSON, Eſq; younger of Charleton, Heir of Colonel St Clair, Purſuer,

AGAINST

Sir JAMES ST CLAIR, Baronet, Heir of Entail, Defender.

THE Court would not allow a proof, to ſhow that the moveable ſucceſſion to which Colonel St Clair ſucceeded as general diſponee of his uncle General St Clair, was exhauſted, to the effect of throwing a debt of the General's upon his heir of entail; and in deciding in this manner, the Court proceeded

ceeded on this ground:—The late Colonel St Clair ſucceeded to General St Clair as heir of entail, as well as heir under a general diſpoſition; and in theſe two characters, had it been his intention to preſerve, againſt the entailed eſtate, any debts for which the unentailed eſtate was inſufficient, he ought to have aſcertained the amount of that eſtate, preciſely in the ſame way as if the heir of entail and the heir under the general diſpoſition had been different perſons. But having neglected this, he ſhowed, (as far as by circumſtances he could ſhow), that he was ſatisfied of the ſufficiency of the unentailed eſtate to anſwer all the debts of General St Clair; and now, at the diſtance of thirty years from the time that the ſucceſſion opened to him, it would be highly irregular to admit a proof for eſtabliſhing the inſufficiency of the unentailed eſtate.

The Lord Ordinary had found the debt to be a burden upon the heir of Colonel St Clair, and not upon the heir of entail to the General's eſtate; and to this judgement the Court adhered.

For the Purſuer, D. Douglas, Defender, J. Oſwald, } Advocates. Jo. Wauchope, C. S. Ja^{s} Dundas, C. S. } Agents.

Lord Dreghorn, Ordinary. Menzies, Clerk.

N° X. Alexander Palmer, Cabinet-Maker, and others, Proprietors of Houſes in Chapel-Street, with concourſe of the Procurator-Fiſcal,

AGAINST

James Macmillan, Butcher in Chapel-Street.

THE queſtion betwixt the parties was, Whether butcher-meat could be expoſed for ſale upon a ſtall in a private area upon the ſide of a public ſtreet?

The ſubject poſſeſſed by Mr Macmillan is ſituated in Chapel-ſtreet, in the ſouth ſuburbs of Edinburgh, which is not a principal ſtreet, but a croſs-ſtreet connecting Nicolſon-ſtreet and Briſto-ſtreet. The ſubject conſiſts of one flat of a houſe on a level with the ſtreet; having a front area betwixt the houſe and the public ſtreet nine feet in breadth, and divided from the ſtreet by a parapet wall; there is alſo a ſmall area or court behind the houſe. This back area Macmillan uſed for ſlaughtering his cattle, and the front area he employed as a public market, in which he expoſed his meat to ſale. The neighbours complained of both practices; and the Sheriff, before whom the queſtion came, having viſited the place, "found, That Macmillan's practice of ſlaughtering "cattle in the back area, and expoſing his butcher-meat at all times without "doors in front of his houſe, are nuiſances, and contrary to the 6th article "of his feu-contract: Therefore prohibits and diſcharges Macmillan from "ſlaughtering cattle in the back area, or expoſing his butcher-meat for ſale "without doors, in front of his houſe, in all time coming."

This judgement was brought under review of the Court by advocation, when Macmillan conſented, that the Sheriff's judgement ſhould remain in force in ſo far as related to the ſlaughtering of cattle in the back area; but contend-

ed,

ed, that he had a right to expose his butcher-meat upon the private area in front of his house.

It is a well-known principle, says Macmillan, that every person is intitled to use his property in the way that may be most beneficial to him, even though a consequential damage should thence arise to his neighbour. From this general rule have sprung servitudes; but these arising from paction, confirm the general principle, and prove, that no person can be debarred from the use of his property, who is not fettered by such servitude. It is true indeed, the law interposes so far for the public interest, that it will not suffer any person wantonly to use his property to the prejudice of his neighbour; but where the right is used neither *in æmulationem vicini*, nor is in itself illegal, he is allowed to use it in the manner most beneficial to himself, *l. 2. D. De aq. et aq. pluv. arcend.*; and agreeably to this general principle have all the decisions proceeded, Dict. vol. 3. p. 363, Clerk against Gordon, 8th July 1760; and p. 349, Dewar against Fraser, January 20. 1767. This rule, however, suffers an exception; a proprietor cannot use his property when it produces a real damage; thus, Dict. vol. 3. p. 350. 29th July 1768, Ralston against Pettegreu; and Kames's Select Decisions, 9th December 1756, Kinloch against Robertson. In the present case the complainers have been able to establish no real damage.

But in answer to this it was said, That the close neighbourhood of those residing in towns renders a certain degree of restriction necessary in the exercise of property; and hence many acts which would be allowable in the proprietor of a rural tenement are illegal in a city. The interest of one individual may be allowed to overbalance the conveniency of another individual; (and this seems to have been the principle in the case of Fraser, Dict. vol. 3. p. 349.;) but that interest must give way to the collective and general interest of a whole community; as was decided 9th December 1756, Kinloch against Robertson.

But besides this general ground, there is another, arising from the nature of the rights, referred to in the judgement of the Sheriff. The clause is contained in the feu-contract of the subject in question, and is in these words: "That "none of the feuers, their heirs or successors, shall allow any shops or yards "for masons, wrights, coopers, smiths, weavers, candlemakers, crackling "houses, nauseous chemical preparations, which may occasion disturbance, "or be a nuisance to the neighbouring feuers, or any other noxious or noisy "manufactories whatsoever, to be placed or kept within any part of their re-"spective feus:" And from this clause it was argued, That although butchers stalls are not *nominatim* expressed among the prohibited trades, yet they must be comprehended under the general expressions in the clause, since so many others less noxious and less disagreeable are enumerated.

In answer to this argument, it was maintained by Macmillan, That the most strained construction of the clause can never extend the meaning of that contract to a prohibition of selling, or exposing for sale, clean fresh butcher-meat, since in no sense of the words can it be considered either as a noisy or noxious manufacture; the contract has therefore no connection with the question, which must be decided upon general principles of law.

In

In judging of this caſe, it ſeemed to have conſiderable weight with the Court, that the ſtreet was not a principal ſtreet, and that the ſtall was not placed upon the ſtreet, but off it, in a private area: and upon the general point their Lordſhips were of opinion, that every perſon has a right to expoſe for ſale the articles in which he deals; that if the butcher-meat expoſed by Macmillan was kept ſweet and clean, there was no reaſon why it ſhould not be expoſed as well as other articles. With regard to the ſpecialty ariſing from the terms of the contract, it was thought to have no effect upon ſuch a caſe as the preſent. The intention of Lady Nicolſon, by whom the ground was feued, certainly was, to prevent any trade or manufacture attended with a noiſe which might incommode the neighbourhood, or productive of ſmells which might prove a nuiſance, from being carried on; but a ſhop where butcher-meat is ſold, if kept in proper order, ſo far from being a nuiſance, is an accommodation to the neighbourhood.

It was thought, however, by ſome of their Lordſhips, that the expoſure of butcher-meat, in the manner practiſed by Macmillan, was a nuiſance, as nothing was ſo apt to ſtartle horſes, or to render cattle furious, as the ſight or ſmell of blood.

One of their Lordſhips had doubts how far it was competent to the Court, had they been ſo inclined, to have impoſed a burden on Macmillan's property, and to have prohibited him from the uſe of his property, even had there been a ſmall degree of nuiſance attending the exerciſe of his right, ſeeing that the ſubject is not within the royalty; his Lordſhip rather inclined to think, that the Court could go no further than to regulate the ſlaughtering of cattle, which was truly a nuiſance. But in anſwer to this, an inſtance was given where the juſtices of peace had removed a butcher's ſtall in the Weſt Port, the butcher having been in uſe to expoſe his meat in that narrow ſtreet, upon the outſide of the houſe or ſhop; the juſtices of peace, in the one caſe, having the ſame power which the magiſtrates poſſeſſed in the other.

The Court came ultimately to this opinion, That Macmillan had no right to ſlaughter cattle in the back area; but "found, That, under the condition of "paving with ſtones the area in front of his houſe, and extending a ſhed "over the ſame, he is intitled to expoſe his butcher-meat for ſale under ſaid "ſhed."

For Palmer, &c. Walter Scott, Macmillan, Tho. Macgrugar, } Advocates. W. Riddel, C. S. W. Whyte, } Agents.
Lord Craig, Ordinary. Sinclair, Clerk.

May 27. 1794. Judges Preſent.

LORD PRESIDENT,

Lords JUSTICE-CLERK, ESKGROVE, SWINTON, DREGHORN,	Lords MONBODDO, STONEFIELD ANKERVILLE, DUNSINNAN,	Lords ABERCROMBIE, CRAIG.

N° XI. PETITION of Mrs AGNES ROBB, Spouſe of William Robb, late Merchant in Glaſgow.

THE object of the petition was to obtain for Mrs Robb an alimentary proviſion out of the ſequeſtrated eſtate of her huſband during his deſertion.

William

William Robb, the bankrupt, had received upwards of L. 2000 with the petitioner, and the truſtee draws annually, for behoof of the creditors, L. 114 Sterling from her heritable property. Prior to the bankruptcy, Robb abſconded: he has been abſent for two years, and the place of his reſidence is unknown. In theſe circumſtances, the petitioner's application was founded, firſt, upon the circumſtance of her having been deſerted by her huſband; and a ſecond ground was, the right, which every liar in heritage has, to claim aliment from the liferenter.

1. The deſertion of the huſband founds the wife in a legal claim for aliment; and that aliment is a lawful debt, for which he is equally liable as for any other; nor is it of any conſequence what are the huſband's motives for ſuch deſertion.

It has been ſaid, that, from the nature of marriage, when the huſband and wife are living together, the wife muſt ſhare the fortune of her huſband, and while ſhe partakes of what he has to himſelf, can have no more to claim; but this does not apply to this caſe, where the matrimonial ſociety is diſſolved by the deſertion of the huſband. Here the aliment is a legal proviſion ariſing from a partial diſſolution, in the ſame manner as other legal proviſions ariſe from the huſband's death, which is a total diſſolution, of the marriage.

If then this right of aliment conſtitute a clear debt againſt the huſband, the wife muſt be intitled to attach his funds by legal diligence in the ſame way with every other creditor; and, in the preſent caſe, ſhe muſt draw a dividend correſponding to the amount of her claim, alongſt with the other creditors; or if ſhe were poſſeſſed of any funds, ſhe would be intitled to make her claim effectual by retention.

Thus, had there been a contract by which the wife had become bound to diſpone part of her heritage *nomine dotis*, and had the huſband deſerted before the diſpoſition was executed, ſhe certainly muſt have been intitled to retention until ſhe was ſecured in her alimentary proviſion. The obligation to aliment upon deſertion, is an obligation that ariſes from the matrimonial contract; and there does not ſeem to be any ground for a diſtinction betwixt it and the obligations of a written contract; it follows, that the debts belonging to the wife, and the rents of heritable eſtates, which would be carried by the legal aſſignation conſequent on marriage, may be retained until the proviſions to which the wife is intitled are made good to her, on the principle, that in contracts implement muſt be mutual.

It may be ſaid, perhaps, that there is no room for retention on refuſal to implement, as the legal aſſignation implied in the marriage has completely transferred the wife's property to the huſband. But a legal aſſignation can have no ſtronger effect than a voluntary aſſignation intimated; and it has been found more than once, that though there be a direct aſſignation by the wife, or her relations, to the huſband; yet, if the ſubject be ſtill *in medio*, it may be retained, in the event of the huſband's bankruptcy, till the counter obligations to the wife are made effectual: Beſides, the rents of the petitioner's heritable eſtate muſt certainly ſtill be *in medio*, and liable to be ſtopped for her ſecurity; and her right of retaining theſe is ſtronger, the radical right of the heritage ſtill remaining with her.

This argument, the petitioner conceived to be founded on the following authorities: Robertſon againſt Robertſon, June 11. 1712, Lord Fountainhall; Dalrymple,

Dalrymple, June 31. 1717, John and Agnes Duncan againſt Alexander Duncan; November 14. 1770, Jamieſon againſt Houſton, Dictionary, "Mutual "Contracts," vol. i. p. 595, 596, 597, and vol. iii. p. 253; Corrie againſt Philp, July 22. 1765; Fountainhall, November 10. 1687, Creditors of Ogilvy againſt Scott; Bankton, b. 1. tit. 5. § 89.

Further, if deſertion continue for four years, the party deſerted may obtain a divorce: deſertion is therefore an inchoate total diſſolution, which ought to intitle the petitioner to a moderate aliment out of her own eſtate.

2. On the ſecond point it was maintained, that the ſame reaſon which gives an aliment to the fiar during any temporary ſuſpenſion of his right, by the exiſtence of a liferent, or by the land falling in ward, muſt give an aliment to a wife during the deſertion of her huſband, holding poſſeſſion of her eſtate *jure mariti*. Were the petitioner liferenting her huſband's eſtate, there could be no doubt of her being liable to aliment the fiar; and, in the ſame way, the huſband, liferenting the petitioner's, ought to be liable; and if to her heir as fiar, certainly he muſt aliment the petitioner herſelf appearing in that character.

The petition was refuſed, with the exception of Lord Dreghorn and Lord Polkemmet, who were for ſeeing.

The Court were of opinion, That a wife muſt follow the ſtate of her huſband ſo long as there is no divorce, and therefore that ſhe can have no claim for an aliment. It was obſerved by one of their Lordſhips, that there was no evidence of this man's having left the country, although he had abſconded; ſo that no divorce could be obtained on the footing of deſertion: But even had this woman come with a divorce in her hand, founded upon his deſertion, it was doubtful whether it would have been effectual, as, by the ſequeſtration, the whole eſtates of the huſband were attached and veſted in the truſtee, for behoof of the creditors, at the time of the bankruptcy, and the claim of the wife, being an after contraction, was not intitled to compete with previous creditors.

It was obſerved too, that were a claim of this kind ſuſtained, there would ſcarcely a bankruptcy occur in which ſimilar claims would not be reared up.

The caſe of Mrs Gordon of Techmurrie was taken notice of by the Court, and the deciſion in that caſe diſapproved of.

For the Petitioner, Mat. Roſs, Advocate. W. Wilſon, Agent.
Inner-houſe. Home, Clerk.

N° XII. ROBERT WALKINSHAW, Sheriff-clerk of Renfrewſhire, Purſuer,

AGAINST

The BAILIES and TOWN-COUNCIL, and for the Feuers and Inhabitants of the Burgh of Greenock, Defenders.

THE queſtion in this cauſe reſolves into a competition of juriſdictions betwixt the ſheriff-court of Renfrew and the burgh-court of Greenock, and depends upon the ſituation of that burgh, and upon the conſtruction to be given to the ſtatute 20 Geo. II. taking away heritable juriſdictions.

By

By charter from the Crown in the 1635, granted in favour of John Schaw of Greenock, and Helen Houſton his ſpouſe, the lands of Greenock were erected into a barony, and the town of Greenock into a burgh of barony. The words of the charter creating the burgh of barony are: "Nec non ereximus, "tenoreque præſentis cartæ noſtræ, erigimus, villam de Greenock in unum li"berum burgum baroniæ, nunc, et cum omni tempore futuro, burgum de "Greenock nuncupand. cum plena poteſtate ſibi dicto Joanni Schaw, ejuſd. "ſpouſæ, eorumque prædict. eligendi, &c. Balivos, &c. cum omnibus immunita"tibus, privilegiis, aliiſque quibuſcunque, ad libertatem burgi ſpectan. adeo li"bere ſicuti aliquod aliud burgum baroniæ infra dict. regnum noſtrum," &c. The privileges conferred by this charter were confirmed and enlarged by ſubſequent grants, and particularly by one in the 1670, proceeding on a narrative of the advantage to be derived to the trade and commerce of the kingdom, as well as to the public revenue. This charter gives and grants "to the inhabi"tants of the burgh, to be received and admitted free burgeſſes by the ſaid John "Schaw and his ſaid ſon, and their foreſaids, full power, &c. to buy and ſell "wine, wax, &c. and all other kind of merchandize and ſtaple goods, and to "pack and peil within the ſamen, with full power to the ſaid John Schaw, &c. "to receive and admit within the ſaid burgh, bakers, brewers, fleſhers, &c. "and all other tradeſmen and mechanics neceſſary, to whom it ſhall be lawful "to uſe and exerciſe theſe ſaid arts and trade, &c. with power to the ſaid "John Schaw, &c. to elect, nominate, &c. bailies, clerks, ſervants, and all "other officers neceſſary for governing the ſaid burgh, yearly, in time co"ming, and to build and keep a tolbooth," &c.

In terms of this charter, the Magiſtrates were named yearly by the Baron down to the 1751, at which time the power of nomination was given up to the inhabitants, in the manner to be immediately mentioned; but it may be proper to obſerve in paſſing, that in the 1741, the late Sir John Schaw granted a charter to the feuers and inhabitants of the burgh, impowering them to meet and make choice of nine of the moſt wiſe, ſubſtantial, and beſt qualified of the inhabitants, to be managers and adminiſtrators of the whole public funds, that then did, or thereafter might belong to the burgh. In the 1751 then, Sir John Schaw granted a new charter to the burgh, narrating the charters from the Crown in favour of himſelf and his predeceſſors, and likewiſe the charter in the 1741; and in the character of Baron of the ſaid barony of Greenock, and burgh of barony thereof, he "gives and grants full power, warrant, and commiſſion, to all the "feuers and ſubfeuers of the ſaid town and burgh of barony of Greenock, "to meet and convene themſelves upon the firſt Monday of May next, at ten "o'clock in the forenoon, and then and there to make choice of twelve of "the moſt wiſe and ſubſtantial of their number to be Magiſtrates and Coun"ſellors of the ſaid burgh, whereof two to be Bailies, one to be Treaſurer, "and the other nine to be Counſellors; with power to the ſaid Bailies, and "their ſucceſſors in office, of holding courts weekly, and oftener if neceſſary, "within the ſaid burgh, for adminiſtering juſtice to the inhabitants therein; "of ſeizing, arreſting, and otherwiſe puniſhing tranſgreſſors and delinquents,

"conform

" conform to the laws of the land, of levying eſcheats, fines, and other a-
" merciaments of court, and, if neceſſary, poinding and diſtraining there-
" for; and with power to the ſaid bailies, &c. to chuſe clerks, &c. with
" power to manage the funds, &c. in place of the nine managers, appointed
" to be choſen by the charter 1741; and with power to make rules and ſta-
" tutes for the regulations of the burgh, &c.; with power alſo of receiving
" merchants, and all kinds of tradeſmen and others, to be free burgeſſes,
" &c. to uſe and exerciſe all other liberties, privileges, and juriſdictions, in
" the ſame manner, and as freely, as thoſe of any other barony in Scotland
" does or may do." The mode of electing the magiſtrates is then pointed out; and there is this reſervation: " That the bailies of me and my heirs in
" the barony of Greenock, ſhall have a cumulative juriſdiction over the inha-
" bitants of the town of Greenock, with the bailies to be choſen as above-
" mentioned in virtue of this grant." This charter contains a precept of ſeiſin, ordering " heritable ſtate and ſeiſin, actual, real, and corporal poſſeſſion,
" of all and whole the powers, liberties, and privileges, and juriſdictions a-
" bove mentioned, to the town-council of the ſaid town and burgh of baro-
" ny of Greenock, to be choſen as above mentioned, and their ſucceſſors in
" office, and that by deliverance to them, or their certain attorney in their
" names, bearers hereof, of a book and baſton, and all other ſymbols re-
" quiſite, to be holden of me and my heirs in the eſtate of Greenock, for
" rendering juſtice to the inhabitants of the ſaid burgh," &c.

From the date of this charter in 1751, the magiſtrates were named independently of the baron; but the burgh having, at the date of the juriſdiction-act, been underſtood to be one of thoſe burghs whoſe juriſdiction was reſtricted, the Magiſtrates refrained from exerciſing the full powers which they poſſeſſed prior to that act, until of late years that they had begun to extend their juriſdiction; and a queſtion having occurred before the burgh-court betwixt John Buchanan and Andrew Turner, in which decreet was given againſt Turner for L. 7 Sterling, the cauſe was brought before the Court of Seſſion, upon the head of incompetency; and the Court having ſuſtained the competency of the burgh court, from that time the magiſtrates had gone on to ſuſtain their juriſdiction, and to decide in queſtions to the greateſt extent.

In this ſtate of matters, it became an object of patrimonial intereſt to the Sheriff-clerk of Renfrewſhire, within which county the burgh of Greenock is ſituated, to reſtrain the juriſdiction of the magiſtrates; and he therefore brought an action, for having it declared, " That the bailies of Greenock,
" named and appointed by the feuers and ſubfeuers thereof, and the bailie
" named by the ſuperior or baron of Greenock, who officiates alſo as clerk
" of Court, have acted illegally, in ſo far as they have exerciſed a higher ju-
" riſdiction than that of baron-bailie; and that they and their ſucceſſors are
" not intitled to exerciſe any higher juriſdiction than that of baron-bailie, as
" laid down by the foreſaid act of parliament;" and concluding againſt the magiſtrates " for L. 100, or ſuch other ſum as ſhall be modified, &c. for the
" loſs and damage which he (the purſuer) has hitherto ſuſtained in the emo-
" luments of his office, through their exceeding their powers of juriſdiction
" as aforeſaid," &c.

In this action it came to be queſtioned, whether this was a juriſdiction ſtruck at by the ſtatute; and if ſo, whether the circumſtance of its having been rendered entirely independent of the baron by the charter in the 1751, was ſufficient to reinſtate it in its full powers. The clauſes in the ſtatute upon which theſe queſtions turned, are the enacting clauſe, which abrogates all heritable bailiaries, &c. after the 25th March 1748, and ſect. 3. and 27. By the former of theſe, all juriſdictions, powers, and authorities, veſted in regalities, bailiaries, &c. are declared to be veſted in and exerciſed by the Court of Seſſion, Sheriffs, &c. to which ſuch juriſdictions, &c. would have belonged had ſuch juſticiary bailiaries, &c. never been granted or erected; and the village, &c. and inhabitants reſiding within the ſame, are declared to be ſubject to the juriſdiction of the ſaid Court of Seſſion, Sheriff-Court, &c. By ſect. 27. it is provided, that nothing in the act ſhall extend "to take away, extinguiſh, or "prejudge any juriſdiction, authority, or privilege by law, veſted in or competent to the corporation or community of any burgh of regality, or of barony, in Scotland, or to the magiſtrates of any ſuch burghs reſpectively, "which are independent of the lord of regality or baron reſpectively."

This cauſe was reported to the Court by Lord Henderland upon informations, when the following judgement was pronounced: "Find, That Roger Stewart and Duncan Campbell, the preſent bailies of Greenock, named "and appointed by the feuers and ſubfeuers thereof, and John Campbell, the "bailie named by the ſuperior or baron of Greenock, acted illegally, in ſo "far as they exerciſed a higher juriſdiction than that of baron-bailies; and "that they and their ſucceſſors in office are not intitled to exerciſe any higher "juriſdiction than that of baron-bailie, as laid down by the 20th Geo. II. c. 23. "and decern and declare accordingly; aſſoilzie the defenders from the other "concluſions of the libel; and decern." Againſt this judgement a petition was preſented, which was appointed to be anſwered. A hearing in preſence was afterwards ordered; and upon adviſing the cauſe this day, their Lordſhips adhered to the former judgement.

In deciding this caſe there were three queſtions taken up by the Court.

1ſt, Whether the purſuer had a proper title to inſiſt in the action; *2dly*, Whether the act aboliſhing heritable juriſdictions, was intended to draw a line betwixt dependent and independent burghs? and, if ſo, Whether this be a dependent burgh in the ſenſe of the act? and *3dly*, If it be held to have been, at the date of the act, a dependent burgh, the juriſdiction of which was thereby reſtricted, Whether the charter in the 1751 reſtored the independency of the burgh, in ſuch a manner as to intitle it to claim its original juriſdiction.

The firſt of theſe points had not been touched upon in the papers; and it occurred only as the doubt of one of their Lordſhips, founded on this, that the objection did not come from thoſe in whom the juriſdictions were veſted, but from one whoſe intereſt was merely contingent, being no more than this, That if the juriſdiction of the magiſtrates was reſtricted, it was poſſible that a greater number of actions might be raiſed before the Sheriff, and conſequently the emoluments of the purſuer's office of Sheriff-clerk encreaſed. But the patrimonial intereſt of the purſuer was held to give him a ſufficient title; and the caſe decided by the Court, betwixt the Commiſſary-clerks and Sheriff-clerks, which

was

was heard in preſence, and ſolemnly decided in the 1748, and which gave riſe to the act of ſederunt 1752, was referred to, as a caſe in point, and ſufficient to eſtabliſh the title of the purſuer.

Upon the *ſecond* point, the Court were unanimouſly of opinion, That the act did draw a line betwixt dependent and independent burghs of barony: That under the latter deſcription were included ſuch burghs as, at the date of the act, were veſted with the power of electing their own magiſtrates: under the former deſcription, thoſe burghs where the power of election remained with the baron (although the nomination might be annual):—and, conſequently, that the burgh of Greenock was, at the date of the act, and in the ſenſe of the ſtatute, a dependent burgh, and, as ſuch, reſtricted in its juriſdiction.

The Judges who were on the prevailing ſide conſidered the act as one which, at the time of its enactment, was of the utmoſt importance to this country, as well as to England, and one which had been prepared with the greateſt care, and by the greateſt men of this, and of our neighbouring country; it was therefore to be preſumed, that the clauſes were conſiſtent and intelligible. The country had, from the moment that the act was paſſed, given a certain interpretation to it, and many juriſdictions had been yielded up in conformity with that interpretation. It was therefore made a queſtion, Whether they ought even to permit this conſtruction (which had been received and univerſally acknowledged for upwards of forty years) to become now the ſubject of inveſtigation? But admitting that the point were ſtill open, the conſtruction which the act has hitherto received was regarded as the proper one. This act was meant to emancipate the people of this country from the ſevere hardſhips which aroſe from the heritable juriſdictions, hardſhips which the people had long and ſeverely felt, and which were to be removed only by the abolition of theſe juriſdictions. In attaining this object, a diſtinction was made betwixt thoſe burghs of barony which were dependent, and thoſe which were independent, a diſtinction which therefore certainly did exiſt. The juriſdiction of the burgh of Greenock was originally veſted in the family of Schaw; the nomination of the bailies was in that family; they had the power of receiving burgeſſes; and every power given by the charter of erection was veſted in that family. In place of naming a judge, the baron might himſelf have exerciſed that office; and although it was ſaid that the magiſtrates were choſen yearly, and when once elected were independent of the baron; yet in this reſpect this burgh was not different from every other dependent burgh of barony in the kingdom: indeed, if it was not to be conſidered as a dependent burgh, there was no ſuch thing in exiſtence, and there could be no ground for the diſtinction which had been ſo expreſsly laid down in the act of parliament.

Another opinion upon this ſide was, that from the hiſtory of boroughs it appears, that, whether they purchaſed their privileges from the Crown, or were raiſed by Royal Authority as a counterpoiſe to the other powers of the ſtate, the privileges which they enjoyed extended merely to ſuch objects of trade and commerce as expediency pointed out; but juriſdiction was not neceſſarily inherent in their conſtitution; on the contrary, it was merely an incidental power, ariſing from expreſs grant, and ſhaped and modified in every caſe by the terms

of

of the deed of erection. In the preſent caſe, the juriſdiction of the borough flowed ſolely from the baron; and his power being reduced by the act aboliſhing heritable juriſdictions, the juriſdiction of the burgh muſt ſuffer a neceſſary diminution.

Upon the other ſide, a compariſon was drawn betwixt the advantages ariſing to this burgh, on the one hand, from its poſſeſſing a power of deciding, at a ſmall expence, and on the ſpot, queſtions relating to the aſſeſſments of the inhabitants, to the police of the city, to the ſervitudes on property, or ariſing from the trade and the tranſactions of the burgeſſes; and the inconveniencies which muſt reſult, on the other hand, from dragging the parties to a diſtant and an expenſive judicature: but at the ſame time, it was admitted that theſe were conſiderations more proper for a legiſlature than for judges, whoſe province it is to decide upon the right of parties as eſtabliſhed by law.

As to the merits of the queſtion, they muſt depend much on the interpretation of the act; and in this there can be no better guide than what is to be gathered from a due conſideration of the act of ſederunt, which preceded the ſtatute, and was in truth the ground-work of the whole. In this act of ſederunt, the Judges of that day expreſſed a very decided opinion againſt the higher hereditary juriſdictions, ſuch as the ſheriff-ſhips and ſtewartries veſted in great families; while they repreſented the leſſer juriſdictions as highly beneficial to the community, and intitled to protection and encouragement. With this aſſiſtance any doubtful clauſe of the act ſhould, without heſitation, be conſtrued favourably for ſuch a juriſdiction as the preſent. The enacting clauſe of the act is ſo expreſſed, that it does not ſeem to apply to the juriſdiction of a burgh of barony, but only to the private baronial power of the baron; and if there be nothing in the enacting clauſe of the ſtatute, there is certainly nothing in the ſaving clauſe which, *vi ſtatuti*, can take away this juriſdiction. But were the matter to be taken up in the words of this ſaving clauſe, this burgh was not a dependent burgh of barony. The inſtant that a burgh is erected, a corporation is created, which cannot be affected by the acts of the baron, or of any individual; and the bailie who exerciſes the juriſdiction given to this political perſon, though he may be named by the baron, is, from the time of his nomination to the expiry of the period of his office, independent of the baron, and conſequently in a ſituation very different from that of a baron-bailie. In the preſent caſe, the burgh of Greenock was, by charter from the Sovereign, and by the power of the Crown, erected "in unum liberum burgum baroniæ;" and its ſtate is declared by expreſſions as ample as are uſed in the erection of any burgh of barony whatever. The power of naming burgeſſes, of electing magiſtrates, or of exerciſing any of the other privileges neceſſary for the exiſtence or for the intereſt of the corporation, which are lodged in the baron, are not powers which he may or may not exerciſe at pleaſure: He has drawn together the inhabitants by proſpects of advantage, he has induced them to purchaſe property, and to embark their fortunes in the eſtabliſhments of the burgh; he has therefore no right in this ſituation (were it lawful for him in the general caſe) to refuſe to exerciſe thoſe powers which he holds for the benefit of the public. But it is not lawful for him to refuſe this. The corporation is a public inſtitution, which is not to be affected by the acts of an individual: it is intended for the good of the public, and for the advantage of the burgeſſes;

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and the baron might be compelled by courts of law to exerciſe thoſe powers which he holds; ſo that in this ſenſe, the burgh, if not nominally, is at leaſt ſubſtantially, an independent one.

Upon the *third* point, it was the opinion of the Court, That the ſtatute looked to the ſtate of the burgh at that time, not to its ſtate at any future period; and as it was then dependent or independent, gave or with-held its original juriſdiction; they were therefore of opinion, that they could give no effect to the charter 1751.

On this point it was ſaid, A baron cannot of his own authority erect a burgh of barony: ſuch erection proceeds from the royal authority alone. But when once a burgh has been erected, the baron may reſign the right in favour of another; and that diſponee will poſſeſs preciſely the power which the baron had to give, and which, ſince the juriſdiction act, muſt be under the limitations of that act. Indeed, in this caſe, it does not appear that the baron conceived himſelf to be giving more, or wiſhed to give more; for he declares, that his own baron-bailie ſhall act with the magiſtrates of the burgh, and poſſeſs a cumulative juriſdiction with them.

On the other hand, it was argued, That if independency be ſufficient to intitle a burgh to its ancient juriſdiction, it is a matter of indifference whether this independency exiſted prior or poſterior to the date of the juriſdiction act; the reaſon of the law applies equally to the one caſe as to the other. It is a miſtake, to ſuppoſe that the baron was creating a burgh of barony by the charter 1751; he was only conveying that power which flowed from the Crown in the original charters of the burgh; and although prior to the independency of the burgh the act might be underſtood to diminiſh its juriſdictions, yet the moment that it was confeſſedly rendered independent, thoſe powers ought to be reſtored. There are many diſqualifications in our laws which are merely temporary: Thus an eſtate gives no title to vote in the perſon of a nobleman, or in the perſon of an officer of the revenue; but whenever it comes into the hands of another proprietor, its rights are reſtored, and it affords a qualification. In the ſame way, it was conceived, that the only thing which prevented this burgh from exerciſing its full juriſdiction was the dependency upon the baron; but the moment that that dependency was removed, the burgh ought to be reſtored to its former ſtate.

In arguing this point it was incidentally conſidered, whether the Crown could, from the date of the act, create a new burgh of barony. On the one hand, it was thought, that an act of parliament was neceſſary; on the other, that this power of erecting was a power inherent in the Crown, which could be lawfully exerciſed, as was done in the caſe of the village of Laurencekirk. The Court were alſo naturally led to conſider the ſtate of the juriſdiction of theſe magiſtrates; for if the baron had no power to give a nomination of a bailie of barony to any individual he might have fixed on, this delegated power of nomination was incompetent; had he meant to veſt a power of election in the corporation, he ſhould have reſigned the right of barony, as was done in the caſe of Paiſley; ſo that theſe magiſtrates, if they hold any power, hold that of baron-bailies.

State of the vote, Adhere or Alter; it carried Adhere, with the exception of Lords Dreghorn, Polkemmet, and Ankerville. The Lord President did not vote, but his Lordship was for altering.

For the Purſuers, Mr Solicitor, Ad. Rolland, } Adv. Ja. Smith, C. S. } Ag.
Defenders, D. of Faculty, Ro. Cullen, & John Clerk, } Adv. En. Moriſon, } Ag.
Lord Henderland, Ordinary. Sinclair, Clerk.

June 3. 1794. Judges Preſent.

Lord PRESIDENT,

Lords JUSTICE-CLERK,	Lords POLKEMMET,	Lords HENDERLAND,
ESKGROVE,	MONBODDO,	ABERCROMBY,
SWINTON,	STONEFIELD,	CRAIG,
DREGHORN,	ANKERVILLE,	METHVEN.

Nº XIII. HUGH CRAWFORD, Wright in Beith, and others, a Committee of certain Inhabitants of ſaid Town,

AGAINST

JOHN WILSON, Innkeeper, acting as Billet-maſter in that Town under a Committee of the Inhabitants.

THE queſtion here was, Whether ſoldiers, for local quarters, could be quartered indiſcriminately on the inhabitants of Beith, (a country village holding of the Earl of Eglinton), or muſt be quartered upon certain deſcriptions of the inhabitants in the firſt place?

By the one party, it was ſaid, That Beith, for fifty or ſixty years back, had been a military ſtation, and that the burden during that period has been confined to public-houſes principally; while, by the other, it was ſaid, That this village became permanently a military ſtation only in ſummer 1787, from which time till October laſt, from twenty-five to forty men were ſtationed there; that ſince October the number of ſoldiers has been increaſed to eighty. The quartering of the troops was at firſt under the direction of the baron-bailie, who billeted upon the inhabitants at large. This duty fell next upon a juſtice of the peace reſiding in the village, who billeted upon ſhopkeepers and tradeſmen of every deſcription, exempting only private families. Upon the death of this gentleman, in the 1790, a billet-maſter was choſen by a committee of the inhabitants, who billeted upon all public-houſes, bakers, brewers, &c. and when that was inſufficient, on the inhabitants at large. On the arrival of the additional troops in October 1793, they were billeted, firſt on the merchants and tradeſmen of all deſcriptions; and this being very much complained of, they were billeted upon the inhabitants in general. But this occaſioning a ſtill greater outcry, the billet-maſter reſigned his office. The billets were then ordered by two neighbouring juſtices of the peace, who again reſtricted the billeting; but finding the office a very unpleaſant one, they alſo reſigned: and in the ſame way, the conſtables, after attempting to regulate this matter, were obliged to give up their offices. The billeting came then to be exerciſed by John Wilſon, the party in this cauſe, acting under authority of a committee of the inhabitants; and

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the method followed by him, when the ſuſpenſion was brought, was to billet upon all the inhabitants in rotation, with the exception of widows, unmarried women, and paupers.

Upon this, a meeting of the inhabitants, to the number of 129 heads of families, ſtyling themſelves the private inhabitants, took place: this meeting appointed a committee of their number to attend to their intereſt; and it was by this committee that an application was made to the Court, praying their Lordſhips "to prohibit the billet-maſter, and all judges and magiſtrates, from billeting any ſoldiers in local quarters upon them and their conſtituents, in regard "that the houſes of publicans and other houſeholders in the town of Beith, "who are by law primarily liable to that burden, are amply ſufficient for the "local quarters of ſoldiers cantoned in the town." The ſimple queſtion, therefore, was, Whether in the town of Beith any deſcription of ſhopkeepers or tradeſmen were more directly liable than another in the burden of quartering ſoldiers. Thoſe who contend that the burden ſhould be indiſcriminate, are the chargers in this caſe; the ſuſpenders are thoſe who think, that innkeepers and others who ſell proviſions are primarily liable.

Argument for the Suspenders.

The laws of Scotland and of England agree upon this point: In England the utmoſt regard is paid to the ſecurity of a man's houſe. "The law of England," ſays Blackſtone, "has ſo particular and tender a regard to the immunity of a man's houſe, that it ſtyles it his caſtle, and will never ſuffer it "to be violated with impunity." Upon this footing, ſoldiers, as well as all other intruders, are excluded, as appears from the petition of right in the 1626, and from the ſtatute which was afterwards paſſed upon this ſubject, 31ſt Cha. II. c. 1. which bears in its preamble, "That by the laws and cuſtoms of this "realm, the inhabitants thereof cannot be compelled againſt their wills to "receive ſoldiers into their houſes." Thus ſtood the common and ſtatute law of England, when, by the annual ſtatute called the mutiny-act, a change was made, permitting "officers and ſoldiers to be quartered in inns, livery-ſtables, ale-houſes, victualling-houſes, and all houſes of perſons ſelling brandy, "ſtrong waters, cyder, or metheglin, by retail, and in no other, and no private "houſes whatſoever;" and to this ſtatute the practice at this hour correſponds.

In Scotland, again, the right of a man to the excluſive poſſeſſion of his own houſe is ſacred and inviolable; and in this light the legiſlature has conſidered quartering of ſoldiers, when it was impoſed as a puniſhment on thoſe who are deficient in the payment of the land-tax. It is to be conſidered then, whether this right be limited or abridged by poſitive ſtatute. The act of Convention 1667 is the earlieſt on this ſubject. It declares, "That all officers and ſoldiers, "horſe and foot, ſhall make due and punctual payment of their quarters, local and tranſient, according to the rates to be eſtabliſhed thereanent by the "foreſaid commiſſioners." The act of Convention 1678 is conceived in the ſame terms. Thus, even in the time of war, and under the dread of an invaſion, no liberty was given to quarter ſoldiers on any perſon againſt his conſent, and no free quarters were allowed, even on innkeepers. Abuſes, however, will be committed; and the act 1681, c. 3. became neceſſary, which prohibits "all "free quartering of ſoldiers, either tranſient or local, and all localities for furniſhing

"niſhing and carrying corn, ſtraw, hay, or graſs, to ſoldiers horſes." This abuſe appears, from the claim of right in April 1689, to have been renewed. That claim declares the exaction of locality, or any manner of free quarters, to be contrary to law. The acts 1689, c. 32. and 1690, c. 6. contain the ſame proviſion.

The act 1695, c. 4. ſpeaks a language ſomewhat different; it ratifies an act of the Privy Council, which requires the officer commanding in chief "to ſee "the whole meat and drink furniſhed to the ſoldiers and officers under his "command by the landlords of the quarters, exactly and completely paid;" and if payment is not made, it is rendered lawful "to the landlords on whom "ſoldiers are quartered, to inſtruct their claims," &c. From this it appears that quartering was at that time confined to public houſes.

By the act 1695, c. 3. a change appears to have taken place, not with regard to the perſons liable to furniſh quarters, but with regard to the nature of the burden. It ordains, That all officers exacting lodging, coal, and candle, gratis, ſhall loſe their commiſſions; and all ſoldiers exacting thoſe "for their "wives and children, ſhall be liable for the parties damage;" which, by implication, proves that ſoldiers themſelves were then admitted to quarters without payment.

Still, however, abuſes prevailed, which it required the act 1698, c. 9. to remedy. This act provides, "That in time of peace within the kingdom, ſol-"diers, in their local quarters, ſhall only be quartered, by thoſe to whom the di-"rection thereof appertains, in burghs royal, or of regality, or the moſt capa-"ble market-towns within the ſhires where their quartering ſhall be ordered; "and that they ſhall not be quartered on tenants in diſperſed onſteads in the "country, upon pretence either of ſtubble quarters, or of any other cauſe "whatſomever, excepting allenarly quarters for deficiency."

This act leaves the deſcription of perſons by whom quartering is to be borne preciſely where it ſtood, and reſtricts quartering to burghs or market-towns, to the relief of the tenants of diſperſed onſteads in the country.

The other party have repreſented this ſtatute, as referring ſolely to times of peace, and that during the time of war the burden becomes general and indiſcriminate. But it is evident, that the war referred to in the act is war within the kingdom. The only other ſtatute is the annual mutiny-act, which provides, That it ſhall be lawful "to quarter officers and ſoldiers in "Scotland, in ſuch and the like places and houſes as they might have been "quartered in, and that the poſſeſſors of ſuch houſes only ſhall be liable to fur-"niſh the ſaid officers and ſoldiers quartered there, as by the laws of Scotland "in force at the time of the Union was provided;" which evidently implies that there was a diſtinction between the terms on which ſoldiers might, and thoſe on which they might not be quartered; and there could be no other diſtinction than that eſtabliſhed by law and practice.

Uſage is the beſt interpreter of law; and in doubtful caſes it is fortunate when recourſe can be had to ſuch an interpreter. In the preſent caſe there is an uniformity of uſage over all Scotland; which muſt appear aſtoniſhing, when it is conſidered how eager every perſon naturally is to get rid of a burden.

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The uſage of Aberdeen, of Dumfries, Ayr, Haddington, Peebles, Stirling, Kirkaldy, Hamilton, Jedburgh, St Andrew's, Cupar of Fife, Kirkcudbright, Montroſe, Paiſley, and Glaſgow, was referred to; and from the whole it appeared, that innkeepers and dealers in proviſions were billeted upon, and, unleſs in caſes of neceſſity, the other inhabitants were exempted: and the reaſon of the practice is obvious; thoſe who give quarters to all travellers, cannot complain when lodging is required for troops; and the burden is moſt properly laid upon thoſe who derive the principal benefit from the reſidence of the troops.

It remains then to mention the deciſions upon this point: By the deciſion 6th February 1789, Earl of Wemyſs and other private inhabitants of the Canongate againſt the magiſtrates, the purſuers were exempted, the Court holding the uſage prior to the act 1698 to have been the ſame as ſince that time;—and in the caſe, 10th February 1789, the procurators of Glaſgow againſt the magiſtrates, the Court found, That the magiſtrates had no power to alter the uſage of quartering.

ARGUMENT FOR THE CHARGERS.

The only ſtatute regulating the mode of quartering ſoldiers in Scotland, is the act 1698, c. 9. and from this act it muſt be evident, that perſons of all deſcriptions living in burghs and market-towns are ſubjected to the burden of quartering ſoldiers: the expreſs exemption of diſperſed tenants in the country ſtrengthens the general rule. But even ſhould it be the opinion of the Court, that in common caſes the quartering of ſoldiers ought to be limited to a certain deſcription of perſons, yet in particular emergencies, ſuch as the preſent, and in time of war, every perſon muſt bear a ſhare of the burden. All the acts paſſed before the Union againſt free quartering and other abuſes, relate only to times of peace; ſo that free quartering, and even quartering on diſperſed tenants in the country, was allowed in time of war; and ſtill more, quartering on the private inhabitants of burghs and market-towns.

Two reaſons have been mentioned, why publicans, bakers, butchers, &c. ſhould be ſubjected to the burden, while the ſuſpenders are relieved; 1ſt, That they are accuſtomed to lodge travellers; 2d, That they derive more benefit and advantage from ſoldiers than the other inhabitants do. The firſt of theſe reaſons can apply only to the keepers of public-houſes; and few of them in Beith are in the practice of lodging ſtrangers. With regard to the ſecond, the ſmallneſs of a ſoldier's pay puts little in his power, and from government-contracts it is obvious that one only of a profeſſion can reap any benefit from the reſidence of troops: ſo that all the other tradeſmen are, in that reſpect, nearly on a par.

The caſes of Glaſgow and Canongate are referred to; but the former of theſe was decided on the cuſtom of the burgh, and forms no precedent; and in the latter caſe the exemption was declared in favour of thoſe only whoſe ſuperior rank had given them an exemption from time immemorial.

The Court were unanimouſly of opinion, that there could be no diſtinction between the parties in this cauſe, and that both were equally liable to the burden of quartering troops. Their Lordſhips therefore refuſed the bill.

There was no opportunity of deciding here the general queſtion, which occurred in the caſe of the inhabitants againſt the magiſtrates of the Canongate, Whether gentlemen of fortune reſiding in a burgh, but not burgeſſes, and entirely unconnected with trade or manufactures, ought to be exempted from the burden of quartering ſoldiers, excepting in caſes of neceſſity? This point was at firſt conſidered, with regret, by ſome of the Judges, as ſettled upon the footing of the deciſion given in that caſe; but the Court appeared to be ultimately of opinion, that the queſtion there was by no means well decided, and that there was no reaſon why it ſhould not be reconſidered when a proper opportunity occurred. Their Lordſhips ſeemed to be led by the following reaſoning: In England, where the burden is impoſed on a particular claſs of people, it is regulated by ſtatute; and although it is a hardſhip, yet it is one which muſt have been in the view of thoſe people when they betook themſelves to their peculiar manner of life: they engage in the undertaking with their eyes open, and with all the diſadvantages of it before them. That rule has not been laid down for this country, nor has any rule been adopted by the legiſlature, ſo that courts of juſtice are left to regulate the matter by the light of reaſon; neither are there deciſions to ſtand in the way of this. The firſt is the caſe of the Calton, where Mr Menzies and others contended, that the burden of quartering ſoldiers could not lie upon them, 1ſt, Becauſe there was no burgh, and 2d, Becauſe the perſons oppoſing were not concerned in carrying on trade; and there the Court repelled both the grounds. The other two caſes were thoſe of Glaſgow and the Canongate: in the former, the general queſtion did not occur; it depended entirely on the practice of the burgh, with regard to billeting upon the members of the ſociety of procurators. But in the caſe of the Canongate, the general queſtion did occur, and the deciſion of the Court ſeems to have given a notion to the country, that the law of England upon this point was adopted, and that the burden of quartering ſoldiers lay in the firſt place upon thoſe who more immediately received advantage from them, then on traders, and ſo on in a regular progreſſion: But the Court did no ſuch thing; the queſtion was not betwixt traders of different deſcriptions, but betwixt burgeſſes and gentlemen who were not burgeſſes; and no doubt the judgement of the Court did find diametrically oppoſite to what had been found in the caſe of the Calton. This therefore is a queſtion of general law, upon which contrary judgements have been pronounced, and which conſequently is at this moment open; and, judging of it impartially, there ſeems to be no ground for throwing the burden upon one claſs of men more than upon another. The gentleman of fortune is more intereſted, as he has more at ſtake; and if the inconveniency of having troops quartered upon him be felt, it muſt be felt in a ſtill greater degree by the ſhopkeeper and mechanic, who has only one or two apartments for the accommodation of his wife and his family.

This point may therefore be held as ſtill open; and it is probable, that in deciding upon it the Court would return to the deciſion pronounced in the caſe of the Calton. The only exemption that is allowed is in favour of ſchoolmaſters, unmarried women, widows, and paupers.

For the Chargers, George Ferguſſon, } Advocates, Wm Patrick, C. S. } Agents.
Suſpenders, John Greenſhields, } Wm Rae, }

Lord Methven, Ordinary. Bill-Chamber.

June 5. 1794. Judges Preſent.

LORD PRESIDENT,

Lords JUSTICE-CLERK,	Lords STONEFIELD,	Lords ABERCROMBY,
SWINTON,	ANKERVILLE,	CRAIG,
POLKEMMET,	HENDERLAND,	METHVEN,
MONBODDO,	DUNSINNAN,	

N° XIV. PETITION of DAVID RUSSELL, Accountant.

THIS was a petition at the inſtance of Mr Ruſſell, as truſtee for the creditors of Scott, reclaiming againſt the judgement pronounced in the caſe N° VII. finding Mr Innes intitled to his dividend out of the funds *in medio*. It proceeded upon this ground, that a poinding was executed by the acceding creditors, which covered the whole effects that had been recovered and divided amongſt them, ſo that this fund had been ſecured by complete diligence nineteen years before the claim at the inſtance of Innes had been entered; and upon this other ground, that the deciſion held out an encouragement to a non-acceding creditor, ſince he might thus attempt to acquire a preference to the very laſt, and failing in his attempt, draw equally with the acceding creditors.

The Court refuſed the petition upon this ground, that the diligence done by the acceding creditors was not intended to acquire, but to prevent preferences; and was, in reality, for the benefit of every acceding creditor. The only queſtion therefore was, Whether there was any thing to prevent this man from being allowed ſtill to accede? and as there was nothing to prevent this, he was intitled to all the benefit of the truſt-deed.

For the Petitioner, R. H. Cay, Advocate. R. Jamieſon, C. S. Agent.

Gordon, Clerk.

June 10. 1794. Judges Preſent.

LORD PRESIDENT,

Lords JUSTICE-CLERK,	Lords MONBODDO,	Lords ABERCROMBY,
ESKGROVE,	STONEFIELD,	CRAIG,
SWINTON,	ANKERVILLE,	METHVEN,
POLKEMMET,	DUNSINNAN,	

N° XV. The Reverend Mr JAMES BEATSON, Charger,

AGAINST

The Honourable HENRY ERSKINE, Dean of the Faculty of Advocates, and others, Heritors in the Pariſh of Kingſbarns, in the County of Fife.

THE queſtion betwixt the parties was, Whether a glebe could be deſigned out of temporal lands, when there were church lands in the pariſh?

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The parish of Kingsbarns, originally part of the parish of Crail, was, in the 1631, disjoined and erected into a separate parish. By the act of erection, there was no glebe designed to the minister of this new parish; but prior to the 1707, L. 100 Scots was paid to the incumbent, L. 60 of which was given in lieu of glebe and grass, and L. 40 for communion-elements. In the 1719, Mr Pitcairn, at that time incumbent, brought a process of augmentation, and also insisted to have a glebe designed; when, in place of the glebe, the heritors indiscriminately, (those possessing temporal as well as those possessing church lands), became bound to pay him L. 60 Scots a-year in proportion to their valued rents. This agreement was not sanctioned by the presbytery; but the payment in terms of it was regularly continued to the minister in the cure, down to the 1787, when the present incumbent, Mr Beatson, was settled. Mr Beatson, although he declined to accept of the old allowance, offered to accept of L. 10 annually, which he considered to be equal to the rent of ground sufficient for a glebe and grass. But this was refused, and he then made an application to the presbytery of St Andrews, that they might design him a glebe. The presbytery accordingly met, and having perambulated and examined the ground in the neighbourhood of the kirk and manse, they ordered four acres of temporal lands from a field called Lochfur, to be measured off; and this they assigned as the glebe of the parish of Kingsbarns, from the term of Michaelmas 1790 in all time coming. This designation was brought under review of the Court by bill of suspension.

From these facts, it will be observed, that besides the question, Whether a glebe can be designed out of temporal lands, where there are church-lands in the parish? it was also a question, What effect the agreement betwixt the heritors and minister was to have? and accordingly the cause was argued under these two heads.

ARGUMENT FOR THE CHARGER:

A glebe is designed to a minister not so much with a view of increasing the value of his benefice, as of supplying his family with those articles in kind, which they require for their use and accommodation; and in this respect the provision of a glebe differs materially from that of a stipend. The latter is modified by the Court, as Commissioners of Teinds, according to particular circumstances; the former is given by the Court in their character of ordinary Judges, and is of a certain extent, whatever the circumstances of the parish may be. Such being the nature of the minister's right to his glebe, it is absurd to say, that the glebe may be designed at a distance from his manse, his stable, his byre, and his barn. Accordingly, there is hardly a parish in Scotland, in which the glebe is not in the immediate vicinity of the minister's manse and offices.

It appears to have been a favourite object with the legislature, to provide ministers with glebes in the vicinity of their manses. The act 1572, c. 48. while it defines the extent of the glebe, declares, that it shall be given of land "lying contigue, or maist eweſt to the manse." The act 1592, c. 118. uses the very same language, and the statute repeatedly speaks of the glebe being adjacent to the manse; while the act 1606, c. 7. goes a great deal further, and declares, that if the arable land that might be designed for a glebe

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is not adjacent to the church, then ſixteen ſoums ſhall be given to the miniſter, of paſture, out of the church-lands lying neareſt to the kirk; which ſhows the anxiety of the legiſlature to protect miniſters againſt the hardſhip of which the charger complains. The act 1644, c. 31. where there are no church-lands in the pariſh, allows the glebe to be taken from the lands moſt commodious and eweſt to the paroch-kirk, with a power to the heritors of offering lands, in place of the neareſt, of equal value, and at no greater diſtance than half a mile from the kirk. The act of convention 1649, c. 45. is ſtill more explicit; for it declares, that where glebes are far diſtant from the manſes, ſo that they cannot conveniently be laboured, they ſhall be changed, and new glebes deſigned more commodious, and nearer to the manſe, and at furtheſt not more than a quarter of a mile from it. And laſtly, it appears, from the act 1663, c. 21. that ſo much was it underſtood that glebes ſhould be adjacent to the manſe, that it was thought neceſſary to exempt incorporate acres in villages or towns.

It may be ſaid here, that theſe acts lay down rules for deſigning glebes where there are church-lands, as well as in thoſe caſes where there are no church-lands in the pariſh; yet it is no where ſaid that temporal lands may be taken, where it is for the accommodation of the miniſter, in preference to church-lands. The charger ſhall conſider that point; but in the mean time he takes it to be undeniable, that it was the intention of the legiſlature to provide every miniſter with a glebe in the vicinity of his manſe and offices.

It is very true, the acts of parliament have not expreſsly enacted, that where there are church-lands in a pariſh, temporal lands may be deſigned for a glebe. The act 1563, c. 72. which is the earlieſt on the ſubject, concludes in general terms: "And further, ſa meikle land to be annexed to the ſaid "dwelling-places of them that ſerves and miniſters at the kirk as ſall be "hereafter with gude adviſement appointed." Here no diſtinction is made between eccleſiaſtical and temporal lands. The act 1592, c. 118. ſpeaks in terms equally unconfined; and the act of convention 1649, c. 45. makes no diſtinction betwixt church and temporal lands; and as it excepts only incorporated acres, the rule, that *excluſio unius eſt incluſio alterius*, is directly applicable to it.

This act 1649, as well as the act 1644, c. 31. was repealed by the reſciſſory act in 1661, yet they were virtually revived by the act 1663, c. 21. which ſtatute declares, "That in all deſignations of glebes, incorporate acres "in village or town, where the heritor has houſes and gardens, the ſame ſhall "not be deſigned, he always giving other lands neareſt to the kirk." This is the only exception in the ſtatute, which is altogether ſilent on the diſtinction betwixt eccleſiaſtical and temporal lands.

It is upon the idea that the acts 1644 and 1649 are ſtill in force by the effect of the ſtatute 1663, that a glebe is given out of temporal lands where there are no church lands; why then ought not the act 1644 to be in force to the effect of bringing the glebe within half a mile of the manſe, or the act 1649, which requires the glebe to be within a quarter of a mile?

The act 1572, c. 48. and the act 1593, c. 165. ſpeak of church-lands as the proper ſubject out of which glebes are to be deſigned; but beſides that

the statute founded on are of a much later date, the situation of the clergy prior to the Reformation deserves to be attended to.

The clergy were at that time possessed of great power, and of immense wealth. "Of fifty-three persons who were Chancellors of Scotland prior to the final Reform, forty-three were ecclesiastics; one half of the judges of the Court of Session were Spiritual Lords; of the taxations the clergy paid one half; and in every parish large domains belonged to the Church, and these lay in the neighbourhood of the church." It was therefore most natural, at that time, and in no case could it be attended with inconveniency, to direct the glebe to be given out of church-lands. But the case came to be very different, when, in consequence of the commission in the beginning of the last century, new churches were erected, large parishes divided, and small ones suppressed; when churches and manses were set down, not for the accommodation of the minister, but the conveniency of the parishioners: and it was probably these circumstances which induced the legislature first to permit glebes to be given out of temporal lands, and then order those placed at a distance, or inconveniently situated, to be removed to the vicinity of the manse.

The true spirit and intendment of the acts of parliament therefore is, that every minister of a rural parish should have a glebe, and that that glebe should be situated at such a distance from the manse as to answer the purposes for which the legislature intended it, or, as should be "maist eweft and commodious."

2. The agreement entered into betwixt the minister and parishioners in the 1719, was acceded to by all the heritors without distinction; by the proprietors of temporal, as well as by the proprietors of church lands; and the payment, in terms of this contract, which has been uniform, subjects the heritors of all descriptions to the burden of a glebe: the temporal heritor therefore, whose ground is contiguous to the manse, is barred from pleading, that temporal lands are, in this case, exempted from the burden of a glebe. Besides, the church and manse were set down for the accommodation of all the heritors; and being placed on temporal lands, it is an additional proof that the heritors of temporal lands had originally no view of being exempted from the burden.

Argument for the Suspenders:

1. At the time of the Reformation, almost the one half of the whole landed property in the kingdom was in the hands of the Church; and when manses and glebes came to be assigned to the reformed clergy, this immense property became the proper and necessary fund whence they were to be given. Temporal lands were therefore originally in no case subjected to this burden; and from an examination of the acts of parliament upon this subject, it will be found that the act of convention 1644 was the first act by which temporal lands could have been designed as a glebe, and even then, only where there were no church-lands in the parish.

The statute 1563, c. 72. is the first act by which the reformed clergy were enabled to obtain manses and glebes; and it provides, That the minister shall have the principal manse of the parson or vicar. The next act, 1572, c. 48. which is intitled an explanation of the former, provides, That the glebe to be given shall be out of the manses pertaining to the parson or vicar; so that it was out of the former glebes only, that, by these acts, glebes could be designed;

No. 15. 10th January 1734.

To correct this defect, the former acts were, by 1593, c. 11. extended to all abbey and cathedral kirks, "whose ministers have glebes pertaining to "parsons or vicars of before." But in order to render the benefit of manses and glebes still more general, the act 1593, c. 165. provides, That where there is no glebe, or where it is less than four acres, "the designation shall be "made of the parson, vicar, abbot, or prioress's lands; and failing thereof, out "of the bishop's lands, friar's lands, or any other kirk lands within the parish."

This act enabled the minister to claim a glebe out of the kirk-lands, in a certain order; but that order led to inconveniency, as it forced him to take his glebe at a distance, where church-lands, though of a more favoured order, lay adjacent to his manse. To remove this inconveniency, the act 1606, c. 7. empowers the minister to claim fourteen soums of grass for the four acres of arable ground, and that out of the "most commodious and best pasturage of any "kirk-lands lying most adjacent and nearest to the said kirks." Still the designation is out of church-lands only.

No other change was made upon these laws till after the Usurpation, when an act of convention, 1644. c. 31. permitted glebes to be designed to the minister of every kirk, out of kirk-lands nearest to the parish-kirk, according to the order of the act 1593; and where there were no kirk-lands, it is declared lawful "to design out of whatsomever other lands, or out of grass when there "is no arable land, most commodious and nearest to the parish-kirks." It is a mistake to suppose, as has been done by the charger, that this act prescribes the distance within which the glebe must be situated. The clause which has given rise to this mistake puts it in the power of the heritor of temporal lands, whose property, on the failure of church-lands, shall be designed, to redeem them by giving other lands within half a mile of the church. There is another act of convention, 1649, which provides, that where glebes are so far distant from manses that they cannot be conveniently laboured, they may be changed, and new ones allotted, within a quarter of a mile at furthest from the church. But this act does not throw the burden upon temporal lands where there are church-lands in the parish; on the contrary, the new designations are to be made by the rules of law then existing.

It was unnecessary, however, to have said any thing about these acts, as they were both repealed by the rescissory act of Charles II. and with the enactments of this statute the suspenders shall conclude their narrative of those acts upon which this question must be decided. It is intitled, An act anent manses and glebes, and proceeds thus: "And because several kirks have no glebes as yet "designed to them, it is hereby specially provided, that, in all designations of "glebes, incorporate acres in village or town, where the heritor hath houses "and gardens, the same shall not be designed, he always getting other lands "nearest to the kirk." The charger understood this to be a proof that temporal lands might be designed, as burgh-acres are never church-lands; but this is a mistake, as will appear from these decisions, Lamont against Brunet, July 13. 1636; and Nairn against Boswell, July 24. 1629. Besides glebes, ministers are by this act intitled to grass for a horse and two cows, and this grass is to be designed, "out of kirk lands, and with relief according to former acts of

"parliament

"parliament standing in force; and if there be no kirk-lands lying near the "minister's manse, out of which the grass for one horse and two kine may be "designed; or otherwise, if the said kirk-lands be arable lands; in either of "these cases, ordains the heritors to pay to the minister and his successors, year-"ly, the sum of L. 20 Scots for the said grass for one horse and two kine, the "heritors being always relieved, according to the law standing, of other heri-"tors of kirk-lands in the parish." This enactment shows it to have been the intention of the legislature, to confine the burden of these provisions in favour of ministers, to church-lands; and if this new burden of grass was to be confined to them, certainly they were not to be relieved of the old burden of the glebe.

These statutes are clear and distinct: the opinions of lawyers, as well as the decisions of the Court, are equally so. Lord Stair, b. 2. tit. 2. § 40. after narrating the different statutes upon the subject, gives it as his opinion, "That "there is no warrant in any of these acts to design temporal lands where "there are any church-lands; and therefore a designation was reduced, be-"cause temporal lands were designed, and kirk-lands passed by; albeit the "minister had been possessor *decennalis et triennalis*, which gave him a pre-"sumptive title, because his designation, which was the true title, was pro-"duced;" February 6. 1678, Lord Forrat against Maters. See also Lord Bankton, b. 2. tit. 8. § 126.; and Mr Erskine, b. 2. tit. 10. § 59.; and Dictionary, vol. 1. p. 350. 357.; Durie, 13th July 1636, Haliburton against Paterson; Lining against Baillie, 27th December 1709, Fountainhall and Forbes's decisions; Potter against Ure, December 5. 1710, Forbes.

2. Upon the effect of the agreement, it is only necessary to observe, that the payment of the trifling duty in lieu of a glebe, was preferable to the investigation which a refusal to pay it would have occasioned. But when, in place of this duty, the minister pursues for a glebe, he gives up his contract, the question comes to be governed by the common rules of law, and the glebe will be designed from those lands upon which the acts of parliament have thrown it: and so far is there from being any thing favourable to the claim of the charger in the choice which has been made of a situation for the church and manse, that the accommodation of the minister has been equally consulted in that choice, as the conveniency of the heritors: indeed the two are inseparable. Besides, the ground upon which both church and manse have been put down may have been the pious gift of some of the heritors, but a gift which cannot be enlarged by force, and which cannot alter the nature of those enactments which the legislature have thought necessary.

The case came before the Court upon informations, when they found, "That "the lands of Lochfurr, being temporal lands, are not liable to be designed for "a glebe to the minister, there being church-lands in the parish; and there-"fore sustained the reasons of suspension of that designation." State of the vote, Sustain or Repell: Sustain, Lords Justice-Clerk, Eskgrove, Swinton, Dreghorn, Stonefield, Ankerville, Henderland; Repell, Lords Polkemmet, Monboddo, Dunsinnan, Craig, Methven; and to this judgement, the Judges present this day, adhered, with the exception of Lords Polkemmet, Dunsinnan, and Methven.

Methven. The Lord Preſident upon both occaſions was againſt the judgement.

In deciding this caſe, both the grounds founded on by the parties were conſidered by the Judges.

1. Upon the firſt point, Whether a glebe can be deſigned out of temporal lands when there are church-lands within the pariſh, the following reaſoning was uſed. In favour of the deſignation, it was ſaid, That although, by the acts paſſed immediately after the Reformation, the deſignation of a glebe could be made from church-lands only; yet it is impoſſible to read the acts 1644 and 1649, without being convinced that it was the intention of the legiſlature, whatever the ſtate of the lands in the pariſh might be, to give to every miniſter a glebe at a convenient diſtance from his manſe. And although it ſeems to have been the meaning of parliament to renew the former enactment, by the act 1663, yet no doubt part of the enacting clauſe of the former ſtatute has been left out. This act firſt lays down the rule for the half acre allowed for the manſe and offices, (which may ſerve to explain the remaining parts of the act); and it will be obſerved, that this allotment is not appointed to be made from church-lands.—Then the act gives the miniſter graſs for two cows and one horſe; and if graſs cannot be conveniently aſſigned to the miniſter, an equivalent is given to him; but this equivalent is not laid upon the heritor of the neareſt kirk-lands, nor upon the heritors of kirk-lands only, but indiſcriminately upon all the heritors of the pariſh. Then comes the enactment, pointing out the manner in which the glebe is to be deſigned; and in judging of this, it is neceſſary to conſider the preamble of the act. It bears, "And becauſe ſeveral kirks have no glebes yet deſigned to them:" To have made the ſenſe complete, it ſhould have added, "And whereas every miniſter ought to be "poſſeſſed of a glebe," &c. But this is taken for granted; and the act accordingly goes on to make the exception to the general rule, in theſe words: "It is hereby ſpecially provided, That, in all deſignations of glebes, incorporate acres, in village or town, &c. ſhall not be deſigned; he always getting "other lands neareſt the kirk." But this elliptical mode of expreſſion, however improper for an act of parliament, can be underſtood in no other way than this, that all lands may be deſigned for a glebe, with the exception ſpecified in the act: and this interpretation will be ſupported by the actual ſtate of the pariſhes in Scotland; for, upon inquiry, it will turn out, that there is not a ſingle landward pariſh where there is not a glebe. It is true, that, in moſt pariſhes, there have been church-lands lying conveniently for the miniſter, out of which the glebe has been deſigned; but it is clear, that, according to the true conception of this act, glebes may be deſigned out of temporal lands, where they are more conveniently ſituated than the church-lands. On the other ſide, it was ſaid, That this conſtruction of the act 1663, however ingenious, is not admiſſible. Our former acts expreſsly lay it down, that church-lands alone can be deſigned for a glebe; and this enactment is ſo ſtrong, that it is not to be got the better of by any implication, nor by any thing leſs than an expreſs enactment reverſing that law. Beſides, upon the interpretation of an act of parliament in the 1663, Stair's authority (who lived at the time) is entitled to the greateſt weight; and he moſt explicitly gives it as his opinion,

that where there are church lands in a parish, the glebe cannot, under this act, be designed out of the temporal lands. This opinion he confirms, by a decision of this Court, pronounced soon after the date of the act. The majority of the Judges therefore considered themselves to be tied down by the acts of parliament; and that, however reasonable it might be to give the glebe out of lands in the neighbourhood of the manse and offices, it was the power of the legislature alone that could enable them to do this.

2. Upon the other point, it was said, That this minister is not to be put in a worse situation than other ministers: Such never could be the intention of the heritors in entering into the agreement with the minister of this parish. It is a transaction which must be taken altogether; and when the parties agree to set down the church and manse in a particular spot, and the heritors, without distinction, bind themselves to give the minister an equivalent for his glebe; and when there is joined to this, the right which this minister has, in common with every other minister of a landward parish, to a glebe, it is impossible that he can be sent to the distance of two miles from the situation chosen by all parties for his manse, when the consequence of that must be, if he labours the glebe, to make his horses and servants go twelve miles a day in addition to their labour, during the time they are employed upon it. But to this it was thought a sufficient answer, That this contract betwixt the parties ought to be taken as it stands: And had the question been, Whether the heritors could now have withdrawn from their obligation? the constant payment, for the length of time which has occurred here, must have bound them; and, if so, the contract, according to the common rule, must bind the other party: Or admitting that this contract were now to be given up, parties ought to be restored to the situation in which they stood when it was entered into in the 1631; and, at that time, there can be no doubt that the glebe could have been designed only out of church lands.

For the Charger, Wm Tait and Jas Clark, Adv. — A. Beatson, C. S. / Jo. Campbell, C. S. Ag.
Suspender, Dav. Cathcart, Adv. — A. Beatson, C. S. / Jo. Campbell, C. S. Ag.
Lord Monboddo, Ordinary. Home, Clerk.

N° XVI. Mr Charles Walker Merchant, Aberdeen,

AGAINST

The Trustees of the deceased John Dingwall of Rennieston, Esq;

THE Judge-Admiral, in a question betwixt these parties, found, That the purchaser of a ship had a right to the freights from the time of his purchase, although the ship was at sea when the sale was made; and that this right could not be defeated by a claim of retention on the part of the freighter, for debts due to him by the former proprietor. Of this judgement a reduction and suspension was brought. The circumstances of the case are these. Mr Cruickshanks was proprietor of a ship called the Princess Ann, and having occasion for the sum of L. 600 Sterling, he applied to the late John Dingwall, Esq; who advanced the money, upon a bill payable in six months from the

date

date of the tranſaction, in September 1788; and, for his ſecurity, he obtained from Cruickſhanks a full and abſolute diſpoſition to the veſſel, he, in return, giving Cruickſhanks a letter, explaining the tranſaction, in the following terms. After acknowledging receipt of the bill, he proceeds thus: "Wherefore, if "ſaid bill is duly and regularly retired, I oblige me, my heirs and ſucceſſors, "to reſtore and retroceſs you to your right to ſaid brigantine, and every thing "contained in your vendition to me, the ſame being done at your expence. "But if ſaid bill is not punctually paid, I am intitled to uſe ſaid vendition in "the fulleſt manner, alſo to raiſe, uſe, and execute all manner of diligence "upon the foreſaid bill, without being liable to any challenge by you, or any "perſon on your account. As the policy of inſurance you have delivered to "me does not fully ſatisfy me, if you do not, within fourteen days from this "date, deliver to me a policy to my entire ſatisfaction, I am to be at liberty "to inſure ſaid veſſel for L. 600 Sterling in my own name, upon your expence; "I am not to be obliged to retroceſs you till the foreſaid principal ſum, intereſt, "and all expences incurred by me, according to my own account, are fully "paid; I am not to be liable for omiſſions, but allenarly for my actual intro-"miſſions."

When this tranſaction was entered into, the veſſel was at ſea, freighted to Charles Walker, the other party in this cauſe; and it is ſaid by Dingwall's truſtees, that the transfer was immediately indorſed on the regiſtry of the ſhip in the cuſtomhouſe; while the other party inſiſt, that this entry was not made until a very conſiderable time afterwards. This, however, does not appear to be a material fact. When the voyage terminated, (which happened in the beginning of February 1789), as the bill had not become due, Mr Dingwall did not interfere with the freight; and it is ſaid to have been paid by Walker to Cruickſhanks. A ſecond agreement was then entered into betwixt Cruickſhanks and Chalmers, of which this is a minute, by Cruickſhanks: "I have agreed with "Mr Charles Walker, merchant, for the freight of the Princeſs Anne, to go "to New York, at L. 45 per month, with two-thirds of all port-charges; and "to commence the 18th June, the date of her beginning to load for that voy-"age, &c. The freight to be paid in Aberdeen; the firſt payment two months "after the veſſel's leaving this port, the ſecond at the end of five months, and "the laſt of it when the veſſel returns to Aberdeen."

The ſhip ſailed on her voyage on the 26th June; and on the 6th July thereafter Mr Cruickſhanks, the owner, was declared bankrupt. Upon the 17th of that month, Mr Dingwall, the purchaſer, intimated his purchaſe to Walker, the freighter, and offered to enter into a charter-party with him. This offer was declined, Walker mentioning, that he had paid to Cruickſhanks, before the ſhip ſailed, L. 80; and Mr Dingwall, when the ſhip arrived from her voyage, having demanded the freight from Walker, he claimed retention from the freights of the ſums due him by Cruickſhanks.

For the balance of freights due by Walker, an action was brought by Dingwall before the Judge-Admiral, who ſuſtained the ſale, and found a balance due of L. 625: 1: $7\frac{1}{12}$, with intereſt; and this was the judgement which was brought under review of the Court of Seſſion by ſuſpenſion and reduction, at the inſtance of Walker.

ARGUMENT FOR WALKER, THE FREIGHTER:

The claim for freight ariſes from a perſonal contract betwixt the freighter and Cruickſhanks, which by its nature could conſtitute only perſonal obligations by the one to the other. His claims of affreightment lay betwixt him and Cruickſhanks; the freight therefore is a debt under this contract, which can be claimed only by a perſon deriving right by aſſignation or ſome other legal mode of conveyance. The queſtion then is, Whether this *jus crediti* was transferred to Dingwall? and if ſo, Whether it paſſed ſubject to the compenſation or retention which would have been good againſt Cruickſhanks?

Had Mr Dingwall founded on an aſſignation to the contract betwixt Cruickſhanks and the freighter, every objection competent againſt Cruickſhanks would have been good againſt Dingwall; and to avoid this, Mr Dingwall founds on the right of property ariſing from the vendition. But to render this vendition effectual, there muſt have been a delivery of the ſhip, in order to have created a real right, for *traditionibus non nudis pactis transferuntur dominia*. It has been ſaid, however, that the transferences of ſhips form an exception from the general rule. But there is no ſuch exception; and ſhips, like all other ſubjects, whether heritable or moveable, require to be delivered in order to transfer the property; were it otherwiſe, latent hypothecks, and fraudulent ſales, *retenta poſſeſſione*, muſt become frequent in that valuable ſpecies of property, which would have very dangerous conſequences.

The circumſtance of a ſhip's being at ſea is one to which the law can pay no regard. If two perſons meet together in London, and agree upon the ſale of a horſe, a jewel, or any article of value, which happens to be locally in Scotland, the mere contract of ſale, though reduced into writing, will not transfer the property without delivery, and yet the reaſon for diſpenſing with the delivery is equally forcible in that caſe as in the preſent. Beſides, it is not neceſſary, in the caſe of a ſhip, to delay the delivery till her return: delivery may be made in a foreign port to an attorney; and in the preſent caſe Mr Dingwall has himſelf to blame for not obtaining delivery before the ſhip ſailed.

But further, Mr Walker, the freighter, had hired the whole veſſel; ſhe was therefore in his poſſeſſion, and the ſhipmaſter was his ſervant during the voyage. He was, in ſhort, the temporary owner. The right of a total freighter has been recogniſed in inſurance-queſtions upon barratry, caſe of Valleio *verſus* Wheeler, Miller on inſurance, p. 170. and Blackſt. vol. 1. p. 454.; and the ſame is the law of Scotland; for though the contracts of location and *commodatum* are perſonal contracts, yet, as ſoon as poſſeſſion follows, a certain ſpecies of real right ariſes, founded in the poſſeſſion; for as the abſolute property cannot be transferred without actual delivery, if the conductor or *commodatarius* hold the ſubject, there can be no ſuch delivery; or if they admit of a delivery, they have it in their power to do ſo under a full reſervation of their own rights. And accordingly the freighter, in this caſe, could not have been deprived of the uſe of the ſhip before the voyages were completed for which ſhe was freighted.

Admitting, however, that the purchaſer had acquired a real right to the ſhip without delivery, ſtill the freighter could not have been forced to account for the freights. The freight is a perſonal debt due to Cruickſhanks, *ex contractu*;

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and by giving poſſeſſion of the veſſel to the freighter, Cruickſhanks did all that was incumbent upon him as a conſideration for the freighter's perſonal obligation. Suppoſe the freight to have been paid down before the ſhip ſailed, the purchaſer could then have had no claim for freight, and he muſt have allowed the ſhip to finiſh the voyage for which ſhe was freighted: Or if bills had been granted for the freight, and theſe bills indorſed away, the freighter muſt in like manner have been allowed the uſe of the veſſel. What difference then ſhould it make that the freight remains upon the perſonal obligation to Cruickſhanks?

The purchaſer's right to the freight muſt be referred to one or other of two titles: Either he muſt claim as aſſignee of Cruickſhanks, in which caſe he muſt admit of compenſation; or he muſt claim upon his right of property in the veſſel, a right which would have intitled him to have with-held it, notwithſtanding that the freight had been paid. But as this claim has been ſhown to be incompetent, the freighter can be under no obligation to the purchaſer, but as aſſignee of Cruickſhanks.

The caſe of leaſes of land may have created ſome doubt upon this point, becauſe the ſingular ſucceſſor in the real right of lands is intitled to claim the rent from the tenants, without being ſubject to any exception of compenſation upon the debts of the former proprietor. But the rights to lands are governed by the feudal law, which never applies to moveable ſubjects; and by the feudal law a proper real right is acquired by infeftment alone. It was a conſequence of this principle, that when the property of land was transferred by ſeiſin, the new proprietor might inſtantly have turned out the old tenants, until they were ſecured in their poſſeſſions by the act 1449, c. 18. which declares, that in the event of a ſale, "the takers ſhall remain with their tacks, till the iſſue of their "terms, whoſe hands ſoever that their lands come into, for ſicklike mail as "they took them for." It is therefore by the force of this ſtatute that the new proprietor is intitled to the whole rent, without deduction or retention.

But in the location of moveables the reverſe of all this is the caſe, ſo that no argument by analogy can be drawn from the location of lands to the location of moveables. Thus, ſuppoſe a horſe had been hired for a journey of many months, and that, after the journey is begun, the owner of the horſe ſells him to a third party, or gives a vendition to a creditor, could the purchaſer or creditor ſay that he had acquired a real right to the horſe, when no delivery of him had ever been made? Or when the hirer returned from his journey, would he not be allowed to retain the hire in compenſation of a debt due to himſelf by the locator, notwithſtanding that this ſale had taken place during the journey? The anſwer to theſe queſtions is obvious, and the application of them to the caſe of a ſhip muſt be favourable for the freighter.

ARGUMENT for DINGWALL, the Purchaſer.

It is clear beyond diſpute, that a contract of location, though cloathed with poſſeſſion, does not bar the proprietor from an effectual ſale of the property, however much he may be in debt to the conductor; and that independent of the peculiarities of the feudal law. A proprietor does not forfeit his poſſeſſion *qua* proprietor, by conferring a ſubordinate right on the conductor; and this

poſſeſſion, alongſt with his title of property, he may transfer to a purchaſer. Accordingly a leaſe of land amongſt the Romans was no bar to a ſale. The ſame rule holds in moveables: a moveable may be ſubject to two or three different poſſeſſions at the ſame time: thus a horſe may be the property of one man, and continue in his poſſeſſion in that character, though it be impledged to a ſecond, and under the charge of a third; theſe ſubordinate poſſeſſions do not impinge upon the poſſeſſion of the proprietor, ſo as to incapacitate him from transferring his property; nor would they prevent that tradition which is neceſſary to complete the right of the purchaſer. Accordingly, in all theſe caſes, none of the conſequences enſue which have been ſtated on the other ſide. On the contrary, the Roman law left the poſſeſſors under theſe perſonal contracts to the remedy of an action *ad indemnitatem*, Voet, *Locati conducti*, § 17. unleſs when it was ſpecially conditioned by the locator, that he ſhould maintain the leaſe; Perezius *ad Cod. lib.* 4. *tit.* 65. § 16.

It is plain therefore, that if a ſingular ſucceſſor might at common law diſregard a contract of location made by his author, it is not as aſſignee that he is intitled to levy the rents ſubſequent to the purchaſe, but *tanquam dominus*; and conſequently no author ever held, that a conductor was intitled to plead compenſation for debts due to him by the locator. The maxim is, That *locatione conductione dominium non transfertur, et locatoris jure perempto perimitur, et jus conductoris*, l. 9. ff. *Locati*. No lien is created by the poſſeſſion, and it is in conſequence of a ſtatutory priviledge, that in this country tenants in lands are ſecure.

Suppoſing, however, that it were to be held, that a purchaſer who knows of a depending contract of location, ſhould be preſumed in equity to have agreed to maintain the conductor in poſſeſſion, he that pleads equity muſt give it, and the conductor muſt pay the rents ſubſequent to the ſale to the new *dominus*; and this is the rule followed out in the ſtatute 1449.

The purchaſer might reſt the cauſe here; but he does further maintain, that the ſale was completed before the contract of affreightment, and that that contract does not amount to a *conductio navis*.

With regard to the former of theſe pleas, it is now eſtabliſhed, that a proprietor of moveables may ſell them, notwithſtanding that he cannot have perſonal acceſs to them, ſo as to give actual or ſymbolical tradition of them. If he has put them on board a ſhip, he indorſes the bill of loading, and the indorſee is ſecure; no act of the former owner's can prevent him from exacting delivery from the ſhipmaſter. It ſeems impoſſible then to conceive why the vendition of a veſſel at ſea, which is an irrevocable transfer of the obligation on the ſhipmaſter to deliver the veſſel to the owner, ſhould not be equally effectual as an indorſement of a bill of loading, eſpecially as this transfer has now, from political regulations, the advantage of publicity, which the indorſement does not poſſeſs, 26. Geo. III. c. 60. § 15.

Upon the other point, that the contract of affreightment does not amount to a *conductio navis*, the freighter uſes this argument: He admits, that when there are ſeveral people who tranſport goods on board a veſſel, and pay freight to the owners, ſuch perſons are not *conductores navis*; but that when one perſon hires the whole tonnage, he becomes a conductor; and in ſupport of this

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he has recourſe to a caſe of barratry, Valleio, Millar's Inſ. p. 169. But it is evident that this caſe has nothing to do with the preſent queſtion; it turns upon the conſtruction to be given to a contract of inſurance. But it may be aſked, in what does this ownerſhip, or *conductio navis*, conſiſt? Is the freighter anſwerable for the navigation of the veſſel? Is he anſwerable for the charges attending her? Does he appoint the maſter and ſeamen? The anſwer is, He has nothing to do with any of theſe matters; he is a mere paſſenger, intitled to the conveniencies of tranſporting himſelf and his goods to the places agreed upon. In ſhort, the poſſeſſion of the proprietor is retained *animo*, and is exerciſed by the maſter for his behoof; all that the freighter obtains by his contract, is not a poſſeſſion of the veſſel, but an accommodation from it, which can afford no right of poſſeſſion or retention.

The queſtion taken up by the Court was, Whether the right in the perſon of Dingwall was equivalent to a ſale? and if ſo, Whether it intitled Dingwall to the profits upon the charter-party, after the date of intimating the ſale, notwithſtanding Walker's claim of retention, in payment of what was due to him by Cruickſhanks at the time of entering into the contract of affreightment.

Upon the firſt of theſe queſtions it was admitted, that the right in Dingwall was not that of an abſolute purchaſer, it was a ſale under reverſion. But then it was maintained, That as the vendition was *ex facie* abſolute, it gave Dingwall the right of a purchaſer from the date of its intimation; for although there was a letter explaining the tranſaction, and intitling Cruickſhanks to put an end to the vendition, upon repayment to Dingwall of L. 600, yet the creditors of Cruickſhanks had no reaſon to object to Dingwall's right ſo long as he reſtricted his demand to that ſum; for they could be in no better ſituation than their debtor. As to the form of the conveyance, it is ſufficiently effectual; for a vendition with an intimation, when the veſſel is at ſea, forms as complete a right as if the veſſel could have been taken up in the hands of the ſeller, and delivered to the purchaſer. The actual poſſeſſion of a ſhip is in the ſhipmaſter, he holds it for the owner; therefore, from the intimation of a formal vendition, the ſhip is underſtood to be held for behoof of the purchaſer.

On the other hand, it was argued, That the right of Dingwall in this caſe did not ſtand upon the vendition alone; the letter which he granted, and the bill which he took for his ſecurity, formed part of the ſame tranſaction; and from the letter it was clear that Dingwall was not proprietor of the veſſel. He was bound to give up his right, on repayment of the L. 600; he was to inſure in his own name to that extent only; and he held at the ſame time a bill for the whole of his advance; which, had the ſhip been loſt, would have intitled him to have made his debt effectual; it is therefore impoſſible to conſider this as a ſale. Beſides, in every ſale there muſt be a price, and here we ſee from the letter that there was no price fixed.

Theſe were the arguments upon this point; and the majority of the Judges ſeemed to conſider the right in Dingwall, in a queſtion with the creditors of Cruickſhanks, to be an abſolute vendition; but there was no occaſion to fix that point by any expreſs judgement, as the concluſion was held to be the ſame,

whether

whether the right were conſidered as an abſolute ſale, or only as a right in ſecurity.

As to the preference claimed by Dingwall, the purchaſer of the veſſel, in virtue of his property in her, over the right of retention of the freight, claimed by the freighter in payment of debts due to himſelf, it was laid down as law, that a purchaſer claiming the profits of a ſubject *jure dominii*, in virtue of a right of property fully veſted in him, is not bound for the perſonal debts of the former proprietor. Had the purchaſer in this caſe, in place of claiming *jure dominii*, claimed through the charter-party, in virtue of an aſſignation to it, the plea, that an aſſignee is liable to the objections proponable againſt the cedent, might have been good. But here Mr Dingwall claims not as aſſignee, but in virtue of a full right of property, and to him theſe objections cannot apply. In the very ſame way, the contract of location, originally, gave no right to the tenant againſt a ſingular ſucceſſor; it required an act of parliament to ſecure the intereſt of the tenant. But this did not ariſe from any thing peculiar to feudal property, it depends upon the nature of all property; accordingly, ſuppoſing a perſon were to purchaſe a flock of ſheep, the purchaſer could not be made liable for the perſonal debts of the former proprietor; conſequently, as Dingwall makes his demand as proprietor, Walker cannot be intitled to retain the freight in payment of any perſonal claims he may have againſt Cruickſhanks.

Neither does it make any difference upon the queſtion, that Dingwall's right ſhall be conſidered as a ſale in ſecurity only. The law is the ſame in both caſes: Thus, a tenant may, in queſtions with his landlord, retain his rents in extinction of perſonal claims; but when the retention is pleaded againſt an heritable creditor of the landlord's, it muſt be over-ruled.

The only anſwer made to this reaſoning was, that the contract upon which Walker claimed retention was entered into, not with the apparent owner only, but with the perſon who was truly and virtually the owner of the veſſel, and conſequently that a *jus crediti* aroſe to Walker, of which he could not be deprived by any ſubſequent contract betwixt Cruickſhanks and Dingwall.

The Lord Ordinary had aſſoilzied Mr Dingwall from the concluſions of the ſummons of reduction, and found the letters orderly proceeded, but found no expences due to either party. To this judgement the Court (19th December 1793) adhered, and a reclaiming petition againſt that judgement was this day refuſed upon anſwers.

State of the vote, Adhere or Alter:—Adhere, Lords Juſtice-Clerk, Eſkgrove, Polkemmet, Abercromby, Craig, Methven.—Alter, Swinton, Stonefield, Ankerville, Dunſinnan.

The vote of the Lord Preſident was not required, but his Lordſhip would probably have voted to alter.

For Walker, Mat. Roſs, } Adv. J. Peat, } Agents.
Dingwall, A. Maconochie. } A. Youngſon, C. S. }
Lord Henderland, Ordinary. Sinclair, Clerk.

June

June 11. 1794. Judges Preſent.

LORD PRESIDENT,

Lords JUSTICE-CLERK, ESKGROVE, POLKEMMET, MONBODDO,	Lords STONEFIELD, ANKERVILLE, DUNSINNAN,	Lords ABERCROMBY, CRAIG, METHVEN.

N° XVII. WILLIAM LAUNIE, Upholſterer in Edinburgh, Purſuer,

AGAINST

ALEXANDER PALMER, Wright in Edinburgh, Defender.

THE claim made by the purſuer was founded on a practice amongſt tradeſmen, by which one who has undertaken a piece of work, and has occaſion to employ other tradeſmen in furniſhing any part of the articles, is intitled to a communication of the profits on theſe articles. This rule was not condemned by the Court, the price of the article to the employer remaining the ſame; and ſince, in many caſes, it is proper, as where, for inſtance, an architect undertakes to build a houſe, and bargains for the ſmith-work or carpenter-work, if the trades-prices only are charged to the employer, this communication is a douceur to the undertaker, who muſt otherwiſe have made a charge upon the employer for the trouble of inſpecting the articles, and ſeeing them properly fitted. But the Court rejected the claim in this caſe, upon this ground, that Launie, the perſon from whom the douceur was claimed, had been employed at the deſire of the perſon to whom the articles were furniſhed.

The Lord Juſtice-Clerk, before whom the cauſe came, had found, that there was an allowance due to Palmer, (the principal furniſher), of 5 per cent.; this judgement was, upon adviſing petition and anſwers, altered, and the allowance to Mr Palmer taken away.

For Purſuer, John Patiſon, Defender, John Dickſon, } Advocates. Charles Mackenzie, James Spotiſwood, } Agents.

Lord Juſtice-Clerk, Ordinary. Colquhoun, Clerk.

N° XVIII. Competition amongſt the CREDITORS of Dr HUGH DOUGALL, Phyſician in Forres.

ALEXANDER SEATON of Preſton, who was indebted to Dr Dougall and his wife, in the ſum of L. 777: 15: 6 Sterling, upon a bond, brought a multiple-poinding, calling the creditors of Dr Dougall, who pretended to have right to this money; and in that action there was produced for John Gordon merchant in Forres, and John Innes writer to the ſignet, an aſſignation to the above bond, in favour of John Gordon, *ex facie* abſolute; but, of the ſame date, the following letter had been granted by Mr Gordon: "Dr and Mrs "Dougall, As you have this day aſſigned to me a bond of Alexander Sea-

" ton of Preſton's, &c. I hereby declare, that the ſaid aſſignation is granted to " me in ſecurity and for payment of different ſums due to me by bills of Dr " Dougall's, of different dates, and in ſecurity of a ſum due to John Innes " writer to the ſignet, by a bill of the Doctor's; and therefore, upon theſe " ſums being paid, and the bills retired, I oblige me, my heirs, and ſucceſſors, " to deliver up the ſaid aſſignment and principal bond, or to execute a tranſla- " tion thereof." At the time of executing this aſſignation, there were two bills, one for L. 200, the other for L. 145, 1 s. due to Mr Gordon, and there was a bill of L. 145, 10 s. due to Mr Innes. Theſe bills were afterwards renewed, and in both caſes additional debts contracted, though to a very ſmall amount; which additions were included in the renewed bills.

To this intereſt the arreſting creditors of Dougall objected, That the renewal of the bills was an extinction of the original debt, and conſequently that the ſecurity did not apply to the new debts; and the Lord Ordinary, upon adviſing mutual memorials for the parties, " found no ſufficient ground for ſuſtain- " ing the claim of preference made by John Gordon and John Innes, and there- " fore diſmiſſed the ſame." And the queſtion coming this day before the Court, upon a petition againſt that judgement, with anſwers, it was ſtated from the bar by the Dean of Faculty, That there was a preliminary objection for the deliberation of the Court, ariſing on the nature of the intimation. The aſſignation of the bond in queſtion had been intimated, while the debtor was abroad, to his agent in this country; and the evidence of it was a writing on the back of the bond by that agent, certifying that the aſſignation had been intimated to him. Now this agent held no factory nor commiſſion from the debtor, nor any power of acting for him, unleſs in ſuch pieces of buſineſs as were expreſsly committed to his charge. To this, Mr Solicitor, for the aſſignees, anſwered, That the agent to whom the intimation was made, although he held no commiſſion from the debtor, was employed by him in the management of all his affairs in this country; and the intimation being made to him, and this followed by a letter from him to the debtor, it was a better and more certain means of making the conveyance known to him, than if he had made the intimation by a notary and witneſſes at the pier and ſhore.

The Court thought the intimation ſufficient, and conſiſtent with the general practice of men of buſineſs; and upon the merits of the queſtion, their Lordſhips ſuſtained the preference claimed by Mr Gordon for himſelf and Mr Innes.

The ground upon which the Court decided this point was this: Where there is an abſolute diſpoſition or aſſignation, ſuch as the preſent, which *ex facie* conveys the full property to the diſponee or aſſignee; although, by a backbond, he may be bound to denude, upon payment of certain debts; yet when the truſter comes to demand reſtitution, the truſtee is intitled to ſet off againſt him, not only the debts mentioned in the backbond, but every debt due to him by the truſter: and accordingly the Court, upon an objection founded on the act 1696, that the money advanced by a diſponee was not advanced till after the date of the infeftment, ſuſtained the ſecurity, and found the diſponee intitled to hold poſſeſſion until he was repaid; as was decided in the caſe of Niblie's

Niblie's Creditors, and in that of Maxwell of Terrachty. This holds equally good in moveable as in heritable property; for as, in the one caſe, the poſterior creditor, treating with the debtor, truſts to the records, he has, in the caſe of bonded debts, the nature of the aſſignation to direct him: And where he finds a moveable bond aſſigned *ex facie* abſolutely, he muſt know that he can be in no better ſituation than the cedent; and cannot force the aſſignee to denude, even on a backbond, without allowing him to retain whatever ſums he may have ſubſequently advanced to the cedent.

In this view of the caſe, there was no occaſion to conſider what would have been the effect of the renovation of the debt. But had this been a conveyance, not abſolute, but in ſecurity of the bills due at the time of executing the aſſignation, in which caſe that queſtion would have come to receive a diſcuſſion; it ſeemed to be the opinion of the Court, that a renovation of the debt would have defeated the ſecurity. It was obſerved, with regard to the caſe of the Bank of England againſt the Bank of Scotland, where the effect of the renovation of debts ſo ſecured came to be conſidered, that what principally moved the Court to decide in the manner they then did, was the nature of the original agreement betwixt the parties, by which it was ſettled and underſtood that there was to be a renewal of the bills ſecured. But were the queſtion to be judged of upon the nature of bills in general, it was thought by ſome of their Lordſhips, that when a new bill was granted, and the old one was taken up, the original debt was diſcharged. Were it otherwiſe, the tranſaction, it was ſaid, would be uſurious, for if the renewals of bills once in the three months, for the ſpace of a year, be conſidered as one tranſaction, and as one loan, from firſt to laſt, the intereſt which will grow upon the debt, by theſe renewals, will amount to more than the legal intereſt upon the principal ſum. Theſe tranſactions ought therefore to be taken ſeparately, and as conſtituting new debts.

For the Aſſignee, Mr Solicitor, M. Roſs, Dean of Faculty and Tait, Lord Craig, Ordinary. } Adv. John Innes, W. S. Jas Saunders, W. S. } Agents. Gordon, Clerk.

N° XIX. The Earl of ABOYNE and Lord STRATHAVEN,

AGAINST

Captain JOHN GRANT.

ALTHOUGH a leaſe, excluding aſſignees, permit ſubſetting to a certain extent, yet an aſſignation to the rents of the ſubleaſes can give no right to the aſſignee, when the principal tenant is bankrupt, and a decree of removing obtained againſt him, for this reaſon, that, even where there is a power to ſubſet, the right of the ſubtenant muſt depend on the right of the principal; and his leaſe being at an end by the removing, there is no ſubject in exiſtence over which the aſſignation can take effect.

For the Purſuer, Dav. Williamſon, Defender, Ar. Fletcher, Lord Craig, Ordinary. } Adv. Ad. Rolland, J. Tawſe, } Agents. Pringle, Clerk.

June

June 12. 1794. Judges Preſent.

Lord PRESIDENT,

Lords JUSTICE-CLERK,	Lords STONEFIELD,	Lords ABERCROMBY,
ESKGROVE,	ANKERVILLE,	CRAIG,
POLKEMMET,	HENDERLAND,	METHVEN.
MONBODDO,	DUNSINNAN,	

N° XX. ROBERT WELSH, Merchant in Liverpool, GEORGE WELSH in Mortonmains, and WALTER WELSH in Caplegill, Purſuers,

AGAINST

ROBERT MILLIGAN in Hightown of Craigs, Defender.

THE purſuers brought this action in order to reduce a bond on the head of forgery. John Welſh, the brother of the purſuers, had occaſion for money, which the defender agreed to advance to him, on his own and his brothers bond. A bond in their names was accordingly prepared by a writer in Dumfries, and was ſubſcribed by John Welſh, in preſence of the writer as a witneſs. Welſh then carried it away; but returned it to the writer the ſame day, with the names of Robert Welſh, George Welſh, and Walter Welſh, as parties, and of two other witneſſes. The writer then filled up the teſting clauſe, in theſe terms: "In witneſs whereof, we have ſubſcribed theſe preſents (writ-"ten by Patrick Macdougal writer in Dumfries), at Dumfries, the 20th Sep-"tember 1787, before theſe witneſſes, the ſaid Patrick Macdougal and Luke "Newlands in Dumfries, and Robert Gilchriſt, ſchoolmaſter in Karlaverock." Luke Newlands deponed, "That neither George, Walter, nor Robert Welſh, "were preſent when he ſubſcribed as witneſs: That John Welſh pointed out "to him his own ſubſcription at the bond, which he acknowledged, and told him "that the other three ſubſcriptions were the ſubſcriptions of his brothers George, "Walter, and Robert; but the deponent ſaw none of them ſubſcribe the bond, "nor did he hear them acknowledge their ſubſcriptions." Robert Gilchriſt, the other witneſs, did not recollect of ſeeing any perſon ſubſcribe the bond; and ſwore that he was certain he did not ſee Robert, George, or Walter Welſh, at that time.

It was upon theſe circumſtances, joined to a very remarkable diſcrepancy betwixt the real ſubſcriptions of the purſuers and the ſubſcriptions adhibited to the bond, that the Court came to judge of this cauſe upon a hearing. Their Lordſhips had no heſitation in reducing the deed, and in finding the defender (who abode by the bond *ſub periculo falſi*) liable in expences.

The Judges expreſſed their regret that it was poſſible for a forgery to be committed, to which the writer of the deed and the witneſſes to the ſubſcriptions could ſo innocently be acceſſory: But when they took into conſideration the preſent practice, where nothing is ſo common as to ſend a deed to the country

country to be executed—to receive it back, with a note of the names and designations of the witneſſes—and to fill up the teſting clauſe from ſuch note—they felt it impoſſible to make either the witneſſes or man of buſineſs liable. The error on the part of the writer was in taking the information of John Welſh, that the other two witneſſes were witneſſes to all the ſubſcriptions appearing at the deed; but this was an error ſanctioned by the invariable practice of men of buſineſs.

The expences were given, as a natural conſequence of the defender's having founded on a forged deed, and becauſe it was his duty to have ſeen the deed properly executed.

The Court thought it a matter deſerving ſerious conſideration, in what way this kind of forgery might be guarded againſt *.

For the Purſuers, Geo. Fergusſon, } Adv. J. Dickſon, C. S. } Agents.
Defenders, Ro. Corbet, } Adv. H. Corrie, C. S. } Agents.
Inner-Houſe. Menzies, Clerk.

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* There have occurred of late ſome queſtions on the teſting of deeds, which may ſerve to put this part of our law upon a better footing. Thus the deciſion in the caſe of Roſs has preſcribed the proper form to be followed where the party is incapacitated from authenticating a deed in the ordinary way: the caſe of Frank has fixed the effect which is to be attributed to the ſubſcription of an inſtrumentary witneſs and the nature and extent of the evidence which he can be permitted to give: and the preſent caſe has laid open a ſcene of fraud, which, though alarming, from the eaſe with which it may be perpetrated in the preſent looſe way of executing deeds, yet admits of a ſimple remedy, and may, in the mean time, introduce a better and more regular practice. It is not to be concealed, that our preſent practice has received too great countenance from that deciſion which ſuſtained, as a formal deed, one where the teſting clauſe was filled up, not only long after the ſubſcriptions were adhibited, but in ſuch a way as to be crowded partly above and partly below the ſubſcription of the party.

Perhaps, after a due conſideration of the acts of parliament, it may appear that the proper remedy in this caſe is to be expected from the legiſlature only: But until ſome legal and effectual check be provided, it might be proper for men of buſineſs to preſcribe to themſelves ſuch a form in the execution of deeds as might guard againſt a fraud of this kind. Were they, for inſtance, to make it an invariable rule, to inſert the teſting clauſe in preſence of the witneſſes, and before the ſubſcriptions were adhibited to the deed, and to read over the teſting clauſe to the witneſſes; perhaps to add to it, "This teſting clauſe being read over to the witneſſes by "the writer thereof, before they adhibited their ſubſcriptions," it would at leaſt impoſe a check which could not be evaded with impunity; for although the omiſſion of this form could neither annul the deed nor affect the witneſſes, yet certainly it would put an end to the preſent looſe and dangerous practice, and when a ſimilar fraud occurred, the man of buſineſs, even were he innocent, would find himſelf anſwerable for the conſequences of his own neglect.

In all events, inſtrumentary witneſſes to deeds ſhould learn, from this caſe, that it is a duty highly incumbent on them, to ſee the teſting clauſe filled up before they ſubſcribe as witneſſes, and that the preciſe fact is there ſtated.

June 17. 1794. Judges Preſent.

Lord PRESIDENT,

Lords JUSTICE-CLERK,	Lords POLKEMMET,	Lords DUNSINNAN,
ESKGROVE,	STONEFIELD,	CRAIG,
SWINTON,	ANKERVILLE,	METHVEN.
DREGHORN,	HENDERLAND,	

N° XXI. ANDREW SKENE of Dyce, Eſq; Charger,

AGAINST

JOHN ROSS, Tackſman of the Bell and Petty Cuſtoms of the Town of Aberdeen, Suſpender.

IN this caſe, there were ſeveral points decided, relating to the power of magiſtrates in exacting the petty cuſtoms of a burgh.

1. By a table of dues made in the year 1707, it is provided, That "all victual or grain coming to market ſhall pay the ordinary dues for cuſtom or "toll," &c. And the queſtion was, Whether, under this table, and the general practice, the tackſman could charge a duty upon ſids and bran? The deciſion of the Court was, That they could, in conſequence of the cuſtom and underſtanding of thoſe upon whom the duty was charged.

2. The table of dues furniſhed by the magiſtrates to their tackſman has this article, "That ilka horſe-load of fruit ſhall pay of cuſtom two ſhillings and "four pennies Scots, and ilka burden of fruit twelve pennies." The tackſman, in virtue of this article, exacted a porportionally greater tax for a cart-load; and the queſtion was, Whether, in making this exaction, he exceeded his powers?

On the one hand, it was thought by ſome of the Judges, that the exaction here was preciſely in the ſame ſituation with that upon butter, where a certain ſum is charged upon the ſtone weight, and proportionally more or leſs according to the quantity; and were not a rule of this kind to be adopted, the tax, it was ſaid, might be entirely evaded. Beſides, he exacted this additional tax in conformity with the cuſtom: it was by that cuſtom that he farmed the tax, and if it was not ſufficient to create a right in the town itſelf, it was at leaſt ſufficient to give the tackſman a poſſeſſory right to exact it.

On the other hand, it was allowed, that magiſtrates of Royal Burghs have a right to levy the petty cuſtoms, and the practice is univerſal: even when new articles of food are introduced, the magiſtrates have a right to impoſe a duty upon them equivalent to the duty upon other articles which they may have diſplaced; as was found in the caſe of the town of Glaſgow, where a duty had been impoſed upon potatoes, although that article had come very lately into uſe: in the ſame way, when the mode of carriage in a country changes, from having better roads, or carriages of better conſtruction, the ta-

bles

bles ſhould be altered, and proportionally greater dues impoſed. But then theſe are changes which can be made by the magiſtrates only, and not by their ſervant or tax-gatherer, whoſe intereſt might induce him to make improper exactions: in ſhort, the table of taxes which he receives from the magiſtrates is the rule which the tackſman ought to follow, and beyond which he cannot go without being guilty of oppreſſion; and in this caſe, as the table has fixed 2s. 4d. Scots as the greateſt ſum to be charged for any quantity of fruit, the ſuſpender has done wrong in charging more; and the majority of the Court came to be of this opinion.

The Lord Juſtice-Clerk Ordinary had found, that the tackſman did wrong in exceeding the charges contained in his table; this judgement the Court had altered, and the queſtion coming now a ſecond time before them, they returned to the judgement of the Lord Ordinary.

State of the vote, Adhere to the former judgement of the Court, or Alter: —Adhere, Lords Stoneſield, Henderland, Dunſinnan, Craig, Methven.—Alter, Juſtice-Clerk, Eſkgrove, Swinton, Dreghorn, Polkemmet, Ankerville.

For the Charger, James Gordon, } Adv. W. Walker, } Agents.
Suſpender, John Burnett and Chs. Hope, } Adv. W. Scott, C. S. } Agents.

Lord Juſtice-Clerk, Ordinary. Sinclair, Clerk.

N° XXII. Competition amongſt the CREDITORS of ALEXANDER HAY, Merchant in Montreal, Canada.

IN this caſe an objection was made to the intereſt produced for James Fleming of the city of London, merchant, founded on this, that his adjudication to the extent of L. 926 had proceeded without the production of his grounds of debt, or of a decree of conſtitution. To this Mr Fleming anſwered, that it could not be denied that a debt truly exiſted; there was produced the account on which the balance due to the claimant aroſe; for L. 926 of this balance a bill had been granted, payable in London, which had been regularly proteſted there; the bill itſelf, it is true, had been ſent to Madeira, and from that to Canada, with a view to recover the debt, though without effect; and there was produced a notorial copy of the bill, and alſo the original proteſt upon ſtamped paper, atteſted by the ſubſcriptions of the notary and witneſſes. Mr Fleming tranſmitted alſo an affidavit on the verity of the debt. Theſe vouchers arrived here within twenty days of the expiry of the year from the firſt adjudication; application was therefore made to be conjoined with an adjudication, leading at the inſtance of other creditors; and they were received by the Lord Ordinary, who decerned in the adjudication, reſerving all objections *contra executionem*. In this ſituation then, and admitting that the non-production of the document were a good objection, does it not follow, that ſince the decree is granted under the quality of reſerving all objections, this objection, like any other, may be obviated by the ſubſequent production of the principal document? An adjudication, reſerving all objections, affords no proof of the conſtitution of the ſpecific debt, ſo that it muſt be incongruous

congruous to require the previous production of the document liquidating the debt. Had a decree of conſtitution been obtained but not produced, would not the objection have been cured by the ſubſequent production? It is a rule of law as of common ſenſe, that where objections are reſerved, none can be fatal which may ſtill be obviated. There is nothing adverſe to this concluſion in the nature or hiſtory of adjudications: it is true, that while appraiſings were in uſe, the debt muſt have been liquidated, becauſe the appraiſing was an actual ſale; but an adjudication creates merely a lien over the ſubject, which may be conſtituted in favour of an illiquid as well as of a liquid debt; and the very competency of a decree, reſerving objections *contra executionem*, implies, that the diligence is a mere conditional lien, depending on the ſubſequent aſcertainment of the debt; and the Court have gone much farther, when they ſuſtained adjudications upon expired bills, and on Engliſh and York-buildings bonds (even after the lapſe of forty years), and allowed objections againſt them to be removed by production of evidence. Beſides, Mr Fleming has produced what is equivalent to a regiſtered proteſt with us; and had an adjudication followed upon a regiſtered proteſt, any objection to it would have been removed by production of the principal bill.

The objecting creditors contended, on the other hand, That, even by the terms of the ſtatute, Mr Fleming's adjudication is void. The act allows ſuch creditors to be conjoined "as are in readineſs for it, and produce the inſtruc-"tions of their debts." Mr Fleming was not in readineſs, and produced no inſtructions of his debt: and although it were poſſible, in an ordinary adjudication, for a creditor to obtain adjudication without producing his grounds of debt; he muſt be able, when he applies to be conjoined, to ſubſume preciſely in terms of the ſtatute. But the want of a written inſtruction is, in the caſe of an ordinary adjudication, and at common law, a total nullity. There muſt, in every caſe, be a decree of conſtitution, or a written document under the hands of the debtor; which proves and liquidates the debt with equal certainty and preciſion as a decreet. Suppoſing, therefore, that it had been poſſible to obtain any decree upon the mere copy of a bill, reſerving objections *contra executionem*, Mr Fleming ought firſt to have obtained a decree of conſtitution, which decree would have been the proper ground of the adjudication. The meaning of reſerving objections *contra executionem* ſeems to be much miſtaken: It is not to be underſtood, that, by reſerving theſe objections, a decree of adjudication may be pronounced, without the production of any previous conſtitution or written document; nor will even a decree of conſtitution be pronounced without a proof of the debt. The caſes in which decrees of this nature are pronounced are caſes requiring diſpatch, where the purſuer produces proof of his libel *ex facie* legal, but to which the defender ſtates defences or objections, which it may require time to diſcuſs. But in a conſtitution, there muſt always be a debt libelled and proved; and in an adjudication, a decree of conſtitution, or a written document of debt, libelled and produced. It is ſaid that Mr Fleming's production is equivalent to a regiſtered proteſt; but there is all the difference in the world betwixt the two caſes. A regiſtered bill and proteſt is in fact a decree of conſtitution; it is ſimilar to a regiſtered bond; and the extract, in both caſes, is conſidered as a decreet of regiſtration.

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The Lord Dreghorn Ordinary, before whom the objection was pleaded, found, "That, by the clauſe of the ſtatute, in virtue of which Mr Fleming claimed to "be conjoined in the adjudication, and was conjoined, reſerving all objections "*contra executionem*, the creditors only who are in readineſs, and have their "grounds of debt to produce, can be effectually conjoined; and therefore his "Lordſhip ſuſtained the objection." To this judgement the Court adhered, 7th March 1794; and the queſtion coming again before their Lordſhips this day on a petition and anſwers, their Lordſhips unanimouſly adhered.

The Court, in pronouncing this judgement, did not proceed upon the grounds ſtated in the Lord Ordinary's judgement; but upon this ground, that no adjudication can proceed, without production of a decree of conſtitution, or of a liquid voucher of debt under the hands of the debtor. A notorial inſtrument is, in this view, no better than a piece of blank paper: it may ſhow that a debt once exiſted; but neither a proteſt nor a copy of the bill can prove more: That however is not ſufficient; there muſt be evidence produced of the actual exiſtence of the debt, which is preſumed from the voucher of debt's being found in the hand of the creditor.

It was thought by one of the Judges, that a decree of regiſtration might be held as a ſufficient voucher of debt, to intitle the creditor to obtain a decree of adjudication. But in anſwer to this it was ſaid, that a decree of regiſtration affords no proof of the preſent exiſtence of the debt; and it was obſerved, that it has been often found to afford no interruption to preſcription. But this point was not before the Court.

For Fleming, Allan Maconochie, } Advocates. And. Stewart, C. S. } Agents.
Objecting Creditors, Mat. Roſs, } A. Barclay, C. S. }
Lord Dreghorn, Ordinary. Menzies, Clerk.

June 19. 1794. Judges Preſent.

LORD PRESIDENT,

Lords JUSTICE-CLERK,	Lords POLKEMMET,	Lords HENDERLAND,
ESKGROVE,	MONBODDO,	DUNSINNAN,
SWINTON,	STONEFIELD,	CRAIG,
DREGHORN,	ANKERVILLE,	METHVEN.

N° XXIII. The TRUSTEES of Craigcrook Mortification,

AGAINST

Mr JOHN SAWERS of Bells-Mills.

THE Court refuſed to give authority to truſtees to feu land which had been conveyed to them, "never to be ſold, but to remain as mortified "land for ever." This queſtion came before the Court by a ſuſpenſion at the inſtance of Mr Sawers, the propoſed feuer.

For the Chargers, Ed. M'Cormick and J. Moir, } Adv. J. Moir, C. S. } Agents.
Suſpender, Allan Maconochie, } T. Manſon, }
Lord Juſtice-Clerk, Ordinary. Gordon, Clerk.

June 24. 1794. Judges Present.

LORD PRESIDENT,

Lords JUSTICE-CLERK, ESKGROVE, SWINTON, DREGHORN, POLKEMMET,	Lords MONBODDO, STONEFIELD, ANKERVILLE, HENDERLAND, DUNSINNAN,	Lords ABERCROMBY, CRAIG, METHVEN.

N° XXIV. JAMES HARDIE DOUGLAS of Falla, and others, Creditors of Thomas Hay, Claimants,

AGAINST

Mr ANDREW HAMILTON, Clerk to the Signet, Truſtee for the other Creditors, Objector.

THE queſtion here was, Whether an aſſignation to a leaſe, upon which no poſſeſſion had ever followed, could be done away by a truſt-deed, *omnium bonorum*, for behoof of creditors? Hay, the bankrupt, was poſſeſſed of a valuable leaſe; and this leaſe he aſſigned to James Hardie Douglas, in ſecurity of a ſum of money borrowed upon a bond. Hay, notwithſtanding, continued to poſſeſs under his leaſe, until he was rendered bankrupt by impriſonment. The aſſignee had hitherto taken no ſtep to complete his right; but upon the bankruptcy of his debtor, he intimated the aſſignation to the landlord.

Hay, after his impriſonment, executed a truſt deed in favour of Mr Andrew Hamilton, conveying to him his whole real and perſonal property for behoof of his creditors, "agreeably to their reſpective rights and preferences;" and, by a ſpecial clauſe, the rights and diligences and preferences of the creditors are preſerved.

Upon this truſt-deed the leaſe in queſtion was ſold; and a preference was claimed by the aſſignee over the price, which was objected to by the other creditors. Lord Stonefield, the Ordinary, had refuſed to allow a preference; when the queſtion came before the Court, they ordered memorials, and upon adviſing theſe, (6th June 1794) "Repelled the objections to the intereſt produced for the claimant, and preferred him upon the funds *in medio* ariſing "from the ſale of the leaſe of Craiglaw." And to this judgement their Lordſhips this day adhered, by refuſing a petition without anſwers.

The ground upon which the Court proceeded was this: An aſſignation of moveables *retenta poſſeſſione* gives no right to the aſſignee; but the aſſignee here is in a different ſituation: It is very true, poſſeſſion alone can complete his title, ſo as to ſecure it againſt third parties acquiring complete rights; and were this a competition with a poſterior aſſignee, who had firſt completed his title, he would be excluded; but that is not the caſe. The aſſignee might, when the bankruptcy happened, have applied to the judge ordinary to have been put in poſſeſſion: he might have ſaid, I had no objection to truſt to your management, when I had reaſon to think you were acting prudently, but now that I ſee things have gone wrong, I muſt aſſume the poſſeſſion on my own account.

The

The truſt-deed, which was a diſpoſition to the *univerſitas*, muſt, in the nature of things, have been granted under the exception of former conveyances. But beſides, it ſaved the rights and preferences of the creditors; at any rate, as it was granted after bankruptcy, it might be reduced on the act 1696.

For the Claimant, Dav. Williamſon. } Adv. J. Rhind, } Agents.
Objector, Geo. Ferguſſon. } A. Hamilton, C. S. }
Lord Stonefield, Ordinary. Sinclair, Clerk.

July 1. 1794. Judges Preſent.

LORD PRESIDENT,

Lords JUSTICE-CLERK,	Lords MONBODDO,	Lords DUNSINNAN,
ESKGROVE,	STONEFIELD,	ABERCROMBY,
SWINTON,	ANKERVILLE,	CRAIG,
DREGHORN,	HENDERLAND,	METHVEN.

N° XXV. JOHN PATON, Collector of the Poor's Funds, Greenock,

AGAINST

JOHN JARDINE and others, Inhabitants of Greenock.

IN ſuſpending a charge for payment of poor's rates in the town of Greenock, the ſuſpenders ſaid, that they had no wiſh to interrupt the application of the poor's funds, but merely to try the queſtion as to the method of laying on the tax and applying the fund; and they accordingly paid their contribution in the courſe of the action. The queſtion therefore came to be, Whether this was the proper action, or whether there were proper parties here for trying the queſtion? The Court found that this was not the proper action, and therefore refuſed the bill of ſuſpenſion, which had been paſſed by the Lord Ordinary, and found expences due.

The charger, in this caſe, was the collector of the poor's rates, whoſe office expired with the year; it was therefore the magiſtrates of the burgh that the ſuſpenders ought (in the opinion of the Judges) to have called, and they ought to have been called by a declaratory action. It was obſerved, that ſuſpenſions have ſometimes been paſſed, in order that general points might be tried; but wherever this has been done, the proper parties were in the field Here the proper parties have not been called; and had they been called, and the ſuſpenſion paſſed for the purpoſe of trying the queſtion, it ſeemed to be the general opinion of the Judges, that even then the collector muſt have been found intitled to his expence, as they could neither come out of his own pocket, nor from the poor's fund.

For the Charger, John Clerk, } Adv. Æn. Moriſon, } Agents.
Suſpender, John Morthland, } Ja. Campbell, C. S. }
Menzies, Clerk.

N° XXVI.

N° XXVI. HENRY PEIRSE, Esq; of Bedale, and others, CREDITORS of HUGH ROSS of Kerse,

AGAINST

The TRUSTEE and EXECUTOR of Mrs ELISABETH ROSS.

THE Court, following the decisions which were pronounced in the case of Ramsay against Brownlie, collected by Lord Kilkerran, and in the case of Baikie against Sinclair, 16th January 1786, affirmed upon an appeal, found, That the annuities due to the late Mrs Ross in the 1780, for which an adjudication was then led, as well as those which have fallen due since, and which were secured by the same adjudication, are heritable, and descend to the heir of the late Mrs Ross.

For the Objecting Creditors, Will. Honyman, Executor of Mrs Ross, Cha. Hope, } Adv. A. Swinton, C. S. B. Whyte, C. S. } Agents.

Lord Swinton, Ordinary. Sinclair, Clerk.

N° XXVII. The TRUSTEES for the Corstorphine and Coltbridge District of Turnpike-roads, Pursuers,

AGAINST

JOHN LINDSAY, Skinner in Edinburgh, Defender.

THE parties in this cause entered into a submission to two arbiters, empowering them "to fix and ascertain the price to be paid by the trus-"tees to Mr Lindsay, for the cot-houses and piece of ground at the west end "of Coltbridge, with their pertinents." The arbiters, by their decision, fixed the value of the cot-houses and piece of ground, &c. at the sum of L. 160 Sterling, which they ordered to be paid at Whitsunday 1792, with interest from that date; and they decerned John Lindsay, "on receiving the said price, "to grant and deliver to the trustees a valid and formal disposition, contain-"ing procuratory of resignation, precept of seisin, clause of absolute warran-"dice, and all other usual clauses," &c. The question therefore was, Whether, upon the construction of this decreet-arbitral, the trustees, in addition to the price of L. 160, were to pay a feu-duty for the lands in question, proportioned to the feu-duty payable by Lindsay for his whole other lands.

In order to fix this point, an action was brought against Lindsay by the trustees, concluding for his granting a disposition "free of all feu-duty, ca-"sualties of superiority, burden, or other incumbrance whatsoever." The Lord Abercromby Ordinary having assoilzied the defender, the question came before the Court upon a petition and answers; when their Lordships altered the judgement of the Lord Ordinary, and decerned in favour of the pursuer.

In opposition to the prevailing opinion, it was said, That, judging from the decreet-arbitral, it must be evident, that, according to the plain and legal meaning

meaning of the language uſed by the arbiters, it was their intention that the purchaſers ſhould pay the feu-duty: Thus, ſuppoſe that a man is poſſeſſed of a piece of ground which pays a certain feu-duty to the ſuperior, the price of which is left to be fixed by arbiters, and that they find the proprietor, upon giving a right to be holden of the ſuperior, intitled to receive L. 160 Sterling as the price of the ſubject; is it not obvious, that it muſt be conveyed under the preciſe ſame burdens for which the ſeller was liable? or, would it be proper in a court, becauſe the ſum of L. 160 may be thought too high, to force the ſeller to convey, not to be holden, in the ſame way that the ſeller himſelf held the ſubject, of the ſuperior, but free of all burden: If this could not be done when the whole property was ſold, neither can it be done when a part only is ſold; if, in the one caſe, the whole feu-duty muſt be a burden on the purchaſer, ſo, in the other, muſt a proportional part of the feu-duty come upon him. In ſhort, it comes to this, that when a ſubject is ſold to be holden of the ſeller's ſuperior, the ſubject paſſes to the purchaſer with all the burdens inherent in the feudal inveſtiture, and no burden remains upon the ſeller, unleſs it ſhall have been expreſsly ſtipulated, that he was to relieve the purchaſer of that burden.

But the opinion of the majority was, That when arbiters are ſent to value an heritable ſubject expoſed to ocular inſpection, it is to be preſumed, that the value which they put upon it is the full and adequate value of the ſubject, as it appears to them, liable only to ſuch burdens as every perſon knows to be annexed to property. But a feu-duty, which is not a neceſſary burden, but on the contrary, depends entirely on the agreement of parties, if it has not been expreſsly mentioned, and fairly brought under the view of the arbiters, cannot be ſuppoſed to have entered into their eſtimate; and therefore, as, in this caſe, the feu-duty was not brought into the view of the arbiters, the ſum fixed by them muſt be held to have been the full value of the ſubject free of all feu-duty. In the ſame way, ſuppoſing two people to be in terms about the purchaſe of an eſtate, they go upon the ground, and inſpect every particular which can enter into conſideration in fixing the value of an eſtate, and at laſt they agree upon twenty-five years purchaſe of the rents; but it afterwards turns out, that the ſeller had feued the eſtate from the ſuperior at the full rent; is it to be conceived, that the purchaſer could be held to pay twenty-five years purchaſe? Impoſſible. In the preſent caſe, L. 160 is the value fixed by the arbiters, and payable by the purchaſers: if the ſeller chooſes, he may put part of this value into the feu-duty; but he cannot claim both the feu-duty and the full price.

State of the vote: Adhere, or Alter; carried Alter, with the exception of Lords Eſkgrove and Stonefield.

For the Purſuers, M. Roſs, C. Hay, } Advocates. Wm Macfarlane, C. S. Chas Livingſton, } Agents.

Lord Abercromby, Ordinary. Pringle, Clerk.

July 9. 1794. Judges Present,

Lord PRESIDENT,

Lords JUSTICE-CLERK,	Lords MONBODDO,	Lords ABERCROMBY.
ESKGROVE,	STONEFIELD,	CRAIG,
SWINTON,	ANKERVILLE,	METHVEN.
DREGHORN,	HENDERLAND,	
POLKEMMET,	DUNSINNAN,	

N° XXVIII. The CREDITORS of Lieutenant JOHN NEWLANDS,

AGAINST

JOHN NEWLANDS, Son of Lieutenant JOHN NEWLANDS.

THE queſtion here turns upon the conſtruction to be given to a conveyance in favour of a perſon in liferent, for his liferent uſe allenarly, and to the heirs lawfully to be procreated of his body, in fee.

Alexander Newlands, merchant and ſkinner in Edinburgh, by a deed dated the 10th June 1771, conveyed certain heritable ſubjects, ſituated in Edinburgh and Silvermills, in favour of John Newlands, "during all the days "of his lifetime, for his liferent uſe allenarly, and to the heirs lawfully "to be procreated of his body in fee." And by a truſt-deed, executed the day following, he conveyed the remainder of his heritable and moveable property to truſtees, to pay his debts and funeral charges, and certain legacies; and the truſtees are taken bound, upon John Newlands arriving at majority, "to denude themſelves of the heritable ſubjects, and diſpone the ſame to the "ſaid John Newlands in liferent, for his liferent uſe allenarly, and to the heirs "lawfully to be procreated of his body, in fee, &c.; and alſo, at his majority, to "aſſign and convey, to him and his heirs, whom failing, to my neareſt heirs, "&c. what may be outſtanding and unrecovered by them, or in their cuſtody "and keeping, of my debts and effects."

John Newlands was the natural ſon of the granter of theſe deeds; and as there was ſome reaſon to apprehend a challenge of them, a gift of *ultimus hæres* was obtained; and in virtue of the truſt-deed and of this gift, the truſtees acted till the majority of John Newlands, (1776), when they conveyed the whole heritable property falling under the truſt, "in favour of the ſaid John Newlands "in liferent, for his liferent-uſe allenarly, and to the heirs lawfully to be pro-"created of his body in fee; whom failing, to the ſaid Alexander Newlands's "neareſt and lawful heirs whomſoever." And having aſſigned the truſt-diſpoſition and gift of *ultimus hæres*, John Newlands was inveſt in the ſubjects (1778.)

John Newlands went into the army; and having contracted a great load of debt, a ranking and ſale of the heritable property, which he held under the above-mentioned titles, has been brought. In this action, appearance was made for his eldeſt ſon, "praying, That the Court would ordain the whole heritable "ſubjects, ſpecially deſcribed in the gift of *ultimus hæres*, to be ſtruck out of "the

"the ſale of the ſubjects belonging to Lieutenant Newlands, in ſo far as con-
"cerns the fee of ſaid ſubjects." And the Court, after hearing parties in preſence, granted the prayer of this petition.

The opinion come to by the Court upon this occaſion was founded on the following reaſoning:

It was agreed on all hands, that it is a principle of the law of Scotland, that a fee cannot be *in pendente*. Upon the death of a proprietor, the fee remains in his *hæreditas jacens*, until it be taken up by the heir; and if the heir do not take it up, it may be taken up by creditors. Neither can a fee be *in pendente* by dereliction: for let a man deſert his property, let him even execute a deed declaring his dereliction, ſtill the fee will remain with him; it can veſt in no other perſon, without ſome act of conveyance from him: the law of Scotland knows no negative without a poſitive preſcription; hence property, though derelinquiſhed for centuries, might (if no poſitive right intervened) be taken up by the heirs of the original proprietor. And there is no diſtinction in this reſpect betwixt heritable and moveable property; there muſt be a fiar in a moveable bond as well as in a landed eſtate.

But different opinions were entertained, as to the conſtruction to be given to ſuch deſtinations as the one in queſtion. On the one hand, the will of the teſtator was held to be the chief rule of interpretation; and it was ſaid to be the great duty of a court to diſcover that will, and, having diſcovered it, to give it (if poſſible) effect; but never, from an idea of neceſſity, to give an interpretation different from the natural and obvious one, far leſs an interpretation oppoſite to the expreſs declaration of the granter; and in diſcovering this meaning, it is highly beneficial to the public that a uniform interpretation ſhould be obſerved. When a father, in his ſon's contract of marriage, diſpones ſubjects to his ſon and the ſon's wife in conjunct fee and liferent, and to the heirs of the marriage in fee, what is the meaning of the deſtination? It is clear that the fee is given away from the donor, and that nothing remains with him: to whom then is it given? In endeavouring to diſcover the will of the donor, he muſt be preſumed to have known the law, and conſequently to have known that there can be no fee in children not yet in exiſtence; it is therefore obvious, that although he has uſed the word *liferent*, he truly meant to give a fee to his ſon, and a *ſpes ſucceſſionis* only to the children of the marriage. Now ſuppoſe that the conveyance had been to the ſon in liferent, for his liferent uſe only, and to the heirs of the marriage in fee, what alteration would that make on the deſtination? The donor has given the fee from himſelf, and he knows that it cannot veſt in children not yet born: The meaning therefore muſt be, ſtill to veſt a fee in the ſon, but a fiduciary fee, a mere *uſus-fructus formalis*, which will not enable him to diſſipate the eſtate, nor to do more than ſpend the annual profits of it, preſerving the eſtate itſelf for the children. The granter, in place of following this method, might have given the liferent only, retaining the fee in himſelf; or he might have appointed a truſtee, to hold the eſtate for behoof of the heirs of the marriage; but, in place of this, he appoints the father of thoſe children, who are ultimately to ſucceed, to attend to their intereſt; and as a truſtee for

uſes

uſes and purpoſes can do nothing to affect the eſtate, nor bind it for his own debts, neither can a perſon holding a fiduciary fee. There is ſtill another caſe: The intereſt of the liferenter may be further reſtricted, by a declaration, that he ſhall have no right of fee, either fiduciary or otherwiſe; and in that caſe the fee would remain with the diſponer himſelf, for behoof of the children. That the ſubſtantial fee was not meant to be given to Lieutenant Newlands in this caſe, is clear; for he is declared to be a bare liferenter, and ſo is precluded from taking the fee. This would have been clear, even without the anxious word allenarly: But that word ſerves to ſtrengthen the meaning; and the uniform ſenſe of the country has been, that this expreſſion implies a bare liferent. In the caſe taken notice of by Stair, this was held: and as every man uſing fixed words muſt be ſuppoſed to know their meaning, the intention of the granter, in this caſe, was perfectly clear, Lieutenant Newlands was to have no more than a liferent.

On the other hand, it was allowed, that the ſimple caſe of a conveyance in a marriage contract to huſband and wife in conjunct fee and liferent, and to the children in fee, was properly interpreted to give a fee to either the huſband or wife, according to circumſtances. But a diſtinction was made betwixt deeds granted by a man in favour of himſelf and his children, and thoſe granted by a ſtranger: in the former caſe, the deſtination gives no more right than would have been given by a bond of proviſion; it intitles the children to ſucceed upon the death of the granter, but does not ſecure them againſt creditors, nor againſt onerous deeds. With regard to deeds by ſtrangers, another diſtinction is to be made betwixt thoſe which convey heritage, and thoſe which convey moveable property: thoſe of the latter deſcription are to receive an interpretation according to the true meaning and import of the deed; and the will of the granter is to be fully carried into effect. In ſuch deſtinations, it may happen that the liferenter poſſeſſes a power of uplifting the money, and having uplifted the money, he may ſpend it; but that is a different caſe from the preſent; and it is only neceſſary to obſerve, that he cannot, by any act in the character of fiar, and under authority of the deed, affect the ſubject, nor can his creditors attach it for his debts. The ſame rule holds in the conveyance of heritable ſubjects, wherever the queſtion occurs with the heirs, or with gratuitous diſponees. But a very different rule of conſtruction comes to be followed when the queſtion is with the creditors of the fiar, or with his onerous diſponees; for it is not by the intention of the granter, that ſuch a conveyance is to be judged of, there are certain rules of law which muſt be taken into conſideration. Thus, in the caſe of Frog, the conveyance was to Robert Frog in liferent, and to children unborn in fee; it was found to be a fee in Robert, and the purchaſer from him was held to be ſecure. But the Court, although they decided in this way in the caſe of a purchaſer, would have decided very differently in the caſe of a gratuitous ſettlement by Robert. Amongſt heirs the diſpoſition would have been held to have given a liferent; amongſt creditors it was found to have given a fee. In queſtions with creditors, then, it is not the will of the granter by which their right is to be tried, the addition of the word "allenarly," therefore, or of the expreſſion, "for all the days of "his life," or of any ſimilar expreſſion, has no effect upon the deciſion of the caſe;

caſe; for, if it be neceſſary to overlook the meaning of the granter where it appears, the moſt anxious expreſſion of his meaning muſt alſo be diſregarded; and the only queſtion is, Whether there be a fee in the diſponee? for if there be a fee, it is attachable by creditors, or affectable by onerous deeds, altho' the deſtination may be of ſuch a nature as to give the heirs a claim of indemnification againſt the fiar. Thoſe of a different way of thinking have had recourſe to a fiduciary fee, in order to extricate themſelves from the conſequences which they ſaw muſt be the reſult of admitting a fee. But what is this fiduciary fee? It has been ſaid to be ſimilar to a truſt. Suppoſe then a truſt-deed to be given to Mr Keith the accountant, he could not, it is true, burden the eſtate; it is a mere truſt in him. But this very truſt implies a ſubſtantial fee ſomewhere; for ſo it was decided by the Court in the caſe of Sir Alexander Campbell, at the late general election for the county of Stirling.

In that caſe, it was clear that the truſt was conſiſtent with a ſubſtantial fee in the granter, deſcending to the heir. This fee was found to be *in hæreditate jacente* of Sir James, and deſcendible to his ſon Sir Alexander: and it was as apparent heir in the fee that the Court ſuſtained Sir Alexander's right to vote. The ſubſtantial fee which we diſcover in Sir Alexander Campbell, muſt, in every caſe, be in the reverſer, and, where there is no reverſer in exiſtence, it muſt belong to ſome perſon; ſo that the queſtion juſt recurs, Can a ſubſtantial fee be *in pendente?* And the deviee of a fiduciary fee, though it removes the difficulty a ſtep, does not ſolve it. Another device has been ſuggeſted; it has been propoſed to make the heir of the granter the fiar. But if ever the heir of the granter, the liferenter, or any other perſon ſhall be allowed to hold the eſtate in truſt for others, and if, upon his death, others may come in, and ſo carry on the truſt, there is at once an end put to the law of entails, to the regiſters, and to the ſecurity of creditors. It would be equivalent to an introduction of the Engliſh ſtatute *de donis* into this country. There was an attempt to do this in the caſe of Macnair, who appointed his heirs to be truſtees for his deſcendants and relations; but the caſe, when it was before the Court, was not ripe for a deciſion: when it returns, as it certainly will, this important queſtion will be tried, Whether it be poſſible to create a ſeries of truſtees to the end of time? We have alſo an inſtance in the caſe of Thomſons, which follows this one, where it is not the firſt inſtitute that is tied up in this way as truſtee for others; but there are ſeveral in ſucceſſion; and if there may be one or two, why may there not be a hundred, or as many as can be contained in any other entail?

In one word then, the firſt queſtion in all ſuch deſtinations is, What is the meaning and intention of the deed? and when this is diſcovered, effect muſt be given to it as far as poſſible. In a queſtion with the granter, or with heirs, the deed will be completely effectual. But in a queſtion with creditors, it is to be conſidered how far it is affected by the law; and where feudal principles interfere, they muſt be allowed to operate. In this queſtion of Newlands, the creditors are intitled to the eſtate.

In anſwer to the argument upon the fiduciary fee and entails, it was ſaid, That there was nothing to prevent a fiduciary fee from being raiſed by con-

ſtruction in the perſon of the liferenter: in the ſame way, ſuppoſe the caſe of a diſponee being deſcribed, who is no where to be found, or who never exiſted, the diſpoſition is ſimply void as to him, for none can claim. So is it in one ſenſe with children unborn, and the fee may be conſidered as remaining with the granter. But this may not be ſufficient for all purpoſes; a feudal ſubject may require to have an exiſting fiar, and one remedy is, to conſtrue the right of the liferenter into a fee. This would be no encroachment on the law of entails, nor would it be contrary to the regulations of the act 1685: creditors could not be hurt, for from the titles they would ſee the nature of their debtor's right; and the great difference betwixt the two caſes lies here, that an heir of entail being veſted with the full right of property, unleſs in ſo far as he is reſtricted, irritant and reſolutive clauſes are required to prevent ſuch an exerciſe of his rights as proprietor as might defeat the deſtination: but here there is no fee given, but a bare liferent; a mere *pro forma* fee is all that is required in compliance with the maxim, that a fee cannot be *in pendente*. The ſuperior has no intereſt to object to this, ſince the liferenter muſt pay the feu-duties, and the heir is not bound to enter during the ſubſiſtence of the liferent. The powers of ſuch a fiar are merely raiſed up by conſtruction, in order to carry the will into effect, for, by the terms of the deed, he is a mere liferenter; and as a truſtee, for ends and purpoſes, cannot burden the truſt-eſtate with his own debts, neither can a fiduciary fiar. To ſay, that there is a ſubſtantial fee in every truſt, and that this ſubſtantial fee cannot be *in pendente*, is to confound terms. In England, a great part of the land is veſted in truſtees, for behoof of heirs unborn; and although the practice is not ſo general here, yet it frequently occurs; and in theſe caſes it is not a fee which is in the reverſers, but a *jus crediti*, which may be *in pendente*, without infringing any principle. In the caſe of Sir Alexander Campbell, the deciſion of the Court proceeded upon the conſtruction of the act 1681; he was admitted to vote on his right of apparency, not upon any intereſt ariſing to him from the truſt-right. And with regard to the effect which the deciſion in the preſent caſe was ſuppoſed to have upon the law of entails, it did not ſeem to make any impreſſion upon thoſe Judges who were for reſtricting the intereſt of Lieutenant Newlands to a liferent. It was ſaid, that the queſtion would be conſidered by the Court when it ſhould occur.

The deciſion in the caſe of Frog, though in general approved of, was cenſured by one of the Judges, who ſaw nothing to warrant the opinion preſerved by Lord Kilkerran, that the Judges conceived themſelves to be bound by the courſe of the deciſions to decide as they had done: he ſaw nothing in theſe deciſions that would have led him to ſuch a concluſion, and he could find nothing like an intention in the granter of the deed, to give a fee to Frog.

There is one thing further which the Collector wiſhes to preſerve, and that is the opinion of the Lord Preſident and of the Lord Juſtice-Clerk upon a point of practice. The Lord Preſident, when ſpeaking of the conſtruction to be put upon moveable deeds, doubted of the diſtinction drawn by ſome of their Lordſhips between the caſe of a liferent marked by the ſimple term, and that where the expreſſion, "in liferent during all the days of his life," was uſed, or the word "allenarly,"

"arly," (a term borrowed from the caſe of conjunct fees). "I have gone over," (ſays his Lordſhip), "all the deciſions, and all the printed papers in them, and I "find nothing ſufficiently fixed to enable us to draw a line. There is an inextri- "cable variety of expreſſion; and you have even inſtances of the moſt perplex- "ing variety in the ſame deed. The term allenarly has no magic power, it is "merely a more anxious expreſſion of what is ſufficiently told without it; and "I declare, that I have never been able to fix, in my own mind, from the deci- "ſions of this Court, nor from any authority in our law, a general rule upon "this ſubject."

The Lord Juſtice-Clerk again ſaid, "When I firſt came to the bar, a diſpo- "ſition to one in liferent for his liferent-uſe allenarly, was univerſally under- "ſtood to veſt merely a liferent and a fiduciary fee in the liferenter, in com- "pliance with the rule, that a fee cannot be *in pendente*; and it would be "moſt unjuſt to alter this now; for there are a thouſand eſtates in this country "ſettled in this way, in perfect confidence of the rule, which, had there been a "doubt upon the ſubject, would have been ſettled upon truſtees."

State of the vote: Strike the ſubjects out of the ſale, or Not. Strike out, Lord Juſtice-Clerk, Eſkgrove, Swinton, Polkemmet, Dunſinnan, Abercromby, Craig.—Not, Lord Henderland, Methven.

Lord Dreghorn did not vote. There was no opportunity for the Lord Preſident to vote, but his Lordſhip ſpoke againſt ſtriking the lands out of the ſale. Againſt this judgement a petition for the creditors was preſented, which was appointed to be anſwered; that the ſubſtance of the pleadings in this caſe might appear upon record. What follows is an abſtract of theſe arguments.

Argument for the Creditors, Petitioners:

A few conſiderations will point out the conſequences of holding Lieutenant Newlands to be either liferenter or fiduciary fiar, and this diſcuſſion will naturally lead to the intention of old Mr Newlands in granting the deeds in queſtion.

The firſt conſequence which naturally preſents itſelf is, That Lieutenant Newlands could make no proviſion for his widow, neither could ſhe be intitled to legal proviſions; and although it may be ſaid, that the ſon, as fiar, would have been bound to aliment his mother, the anſwer is plain, that there might have been no children: it alſo follows, that Lieutenant Newlands could not charge the eſtate with one fixpence to his younger children; but can it be preſumed, that old Mr Newlands willed ſuch conſequences as theſe? Nothing is more common than to reſtrict, in favour of the heir, the proviſions to the widow and children; but there is no inſtance where the perſon in poſſeſſion was abſolutely diſabled from making the ſmalleſt proviſion either for his wife or younger children. It muſt therefore be preſumed, either that old Newlands intended what no man before him ever intended, or that he meant to give more than a mere liferent or fiduciary fee.

Theſe are the conſequences which ariſe within the family of the grantee of ſuch a deed; but there are other conſequences which muſt follow with regard to the ſubject itſelf, taking it before Lieutenant Newlands had any children.

It

It was poſſible, that theſe lands might have been liable to an aſſeſſment for building kirks and manſes; in which caſe, it is a general rule, that the fiar muſt advance the money, and the liferenter pay the intereſt during his life: Where then was the principal ſum to come from? There is no fiar, and the law cannot force the liferenter to advance it out of his own pocket: beſides, the liferenter may be unable to raiſe it, and if he is to be held as a mere liferenter, he can give no ſecurity over the ſubject. The ſame difficulty occurs if Lieutenant Nowlands is to be conſidered as fiduciary fiar; for if he is allowed to borrow money for the uſe of the eſtate, there is at once an end of the truſt.

Part of the ſubjects are houſes in Edinburgh; the liferenter is bound to give all ordinary repairs; but ſuppoſe them to have become ruinous, and to have been condemned by the Dean of Guild, who had ordered them to be rebuilt when there was no fiar in exiſtence, the liferenter could not have been bound to advance the money, and in three years time the right would have devolved upon the magiſtrates. What then becomes of the *præſumpta voluntas* of the teſtator? With a fiduciary fiar the caſe is exactly the ſame; and this doctrine applies equally to the caſe of farm houſes, upon a rural tenement, becoming ruinous.

It has been ſaid, that in theſe, and in many other caſes which may be put, the fiduciary fiar may come to the Court; but will the Judges ever give ſuch an interpretation to a ſettlement, as to render it daily neceſſary to apply to the Court for power to explicate the will of the teſtator?

There are other caſes in which the *voluntas teſtatoris* may be totally defeated by the liferenter or fiduciary fiar. Suppoſe the eſtate to conſiſt of heritable or moveable bonds, there may be a doubt, whether the liferenter or fiduciary fiar could compel the debtors to pay; but certainly the debtor cannot be compelled to keep the money longer than he chuſes. If then the money be paid, what is to become of the fee, and of the *voluntas teſtatoris?* who is to compel the liferenter or fiduciary fiar to lend this money out again? or if he do lend it out, who is to compel him to lend it out in terms of the original truſt? In the ſame way, if the eſtate conſiſts of a right to teinds, of a wadſet, or of lands held by a charter of adjudication, in all theſe caſes the purpoſes of the truſt may be entirely defeated; the heritor may obtain a ſale of his teinds, and the reverſers may redeem the wadſets and adjudged lands; and there is no perſon who is intereſted or bound to ſee the money applied to the purpoſes of the truſt.

It may be ſaid in anſwer to theſe ſuppoſitions, that all truſts are ſubject to fraud, and that truſts of the kind here ſuppoſed are infinitely more liable to fraud than common truſts. It may be farther ſaid, that theſe difficulties ariſe from the neceſſity of the law, againſt which there is no remedy. But every perſon is preſumed to know the law; and when a perſon makes ſo looſe a ſettlement as to give to his children nothing but a *ſpes ſucceſſionis*, the legal preſumption is, that he intended no more than a *ſpes ſucceſſionis*.

It remains to conſider the conſequences which the judgement may produce to third parties. It is clear that this fiduciary fee can be inferred only by implication; for *ex figura verborum* Newlands is a liferenter. But not only muſt the truſt, but the whole powers and duties of the truſtee, be left to infe-

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rence and conjecture. Now there is hardly any device in the law of Scotland of which the legiſlature has diſcovered more jealouſy than of implied truſts; indeed it is a great doubt whether they are not abſolutely reprobated. The act 1696, c. 25. conſidering that implied truſts are the occaſion of frauds, ordains, That "no action of declarator of truſt ſhall be ſuſtained as to any deed of truſt "made for hereafter, except upon a declaration or backbond of truſt, &c. or "unleſs the ſame be referred to the oath of the party *ſimpliciter*." And as the preſent ſeems to be a declarator of truſt, without any declaration of truſt or backbond, it ſhould be diſmiſſed. But whatever there may be in this, it is evident that the law is jealous of all latent truſts, and therefore the Court will not extend them againſt third parties.

Without running through numberleſs inſtances of the difficulties ariſing upon fiduciary fees, it may ſuffice to mention one or two, which will ſufficiently illuſtrate the argument. Suppoſe then that the fiduciary fiar has occaſion to borrow money for repairing houſes, or for building a farm-ſteading, how is the creditor to diſcover the extent to which the fiduciary fiar may go, ſo as to ſecure himſelf againſt loſs? If it be ſaid, that no perſon is under an obligation to contract with the fiduciary fiar, and therefore, if he loſes, he has himſelf to blame; then, upon this principle, a fiduciary fiar cannot borrow a ſixpence, and the truſt-eſtate muſt go to ruin. Further, for what endurance, and upon what conditions can he let a tack? If for his own lifetime only, no improvements can be made when the tenure is ſo precarious.

An argument alſo ariſes, from conſidering the relative ſituation in which the liferenter or fiduciary fiar ſtands, both with regard to ſuperior and vaſſal. It has been ſaid, that the ſuperior cannot compel the fiar to enter, during the life of the liferenter or fiduciary fiar: It was alſo ſaid, that a fiar cannot validly renounce his fee. But ſuppoſing the real fiar not to be in exiſtence, there is certainly nothing to prevent the liferenter or fiduciary fiar from renouncing their rights; and, if ſo, what becomes of the intereſt of the ſuperior and of the intereſt of the expectant fiar?

It was ſaid, that the *voluntas teſtatoris* was not to be diſappointed, from a regard to the intereſt of the ſuperior. But until the forms of the feudal law are done away, it is a good argument to ſay, that a ſettlement is inconſiſtent with the intereſt of the ſuperior. This ſettlement is inconſiſtent with the intereſt of the ſuperior in another way: He muſt be deprived of all caſualties from the entries of heirs; for if a ſucceſſion of liferenters be in this way created, (which it is allowed may be done), then, upon the death of the one, the other comes into his place, without the neceſſity of an entry from the ſuperior. But, on the other hand, there may be a danger that theſe perſons ſhall be conſidered as ſingular ſucceſſors, and, if ſo, the balance will lie in favour of the ſuperior, who will be entitled to a year's rent on the entry of each; and it will then be proper to conſider, how far this burden can at all correſpond with the *præſumpta voluntas teſtatoris*.

If, again, the diſponee be conſidered as liferenter, and the fiar is not yet in exiſtence, how is a vaſſal to be entered? for no liferenter, but by reſervation, has a power to enter vaſſals. If a fiduciary fee is ſuppoſed, it becomes doubtful whether he have the power of entering vaſſals. One thing, at leaſt, is

certain, that the caſualties muſt belong to the fiar, and make part of the truſt-eſtate: in what manner then ſhall this money be ſecured?

In ſhort, whatever way the creditors turn themſelves, they can ſee nothing but confuſion and perplexing difficulties, reſulting from the principles upon which the preſent interlocutor is founded. The conſideration of theſe difficulties will not only pave the way for the argument, that an abſolute fee muſt be held as veſted in the nominal liferenter, but will alſo, in a great meaſure, explain the principles upon which thoſe deciſions have been pronounced, which the creditors are to ſtate in ſupport of their argument.

In arguing this queſtion, there are two points which the judgement of the Court entitles the creditors to aſſume as axioms: 1. That a fee cannot be *in pendente*; 2. That the caſe of Frog is now a fixed rule of law. Theſe propoſitions being granted, the queſtion is much narrowed, and reſolves into the following point, Whether the addition of the words, "for liferent-uſe alenarly," ought in law, or does in practice, make any difference on the extent of a right taken to one in liferent, and to his children *naſcituri* in fee?

It being admitted that the caſe of Frog is an eſtabliſhed rule, it would have been unneceſſary to have taken further notice of it, or of ſimilar caſes, if it were not proper to ſhow the principles upon which theſe caſes have been decided: And the creditors maintain, that they were not decided on the ſingle principle of a regard to the *præſumpta voluntas teſtatoris*; but upon this other principle, that a fee cannot be *in pendente*,—directly in the face of what was underſtood to be the *enixa voluntas teſtatoris*.

With regard to the caſe of Frog, the beſt evidence that can be brought of the poſition is to be found in Kilkerran, (*voce* Fiar, p. 190.); and from that, it appears, that although at firſt the Court, moved by the *voluntas teſtatoris*, found that the fee was not in the nominal liferenter; yet afterwards they, *ex neceſſitate juris*, thought themſelves obliged to alter that judgement, and to find that the fee was in him. It alſo appears, from Lord Kilkerran, that the Court pronounced their judgement with equal regret in the caſe of Lillie againſt Riddell. The Court ſaw, in the maker of the deed, a double *voluntas teſtatoris*: The grand and primary will was to give the eſtate to a particular family; the ſecondary and ſubordinate will, related to the mode of giving; and they juſtly gave effect to the primary and catholic will, by giving the eſtate to that family, in the way permitted by law. This diſtinction ſolves every difficulty in the caſe, and reconciles the *voluntas teſtatoris* with the ſtructure of the law: It explains, on clear principles, the deciſion in the caſe of Frog, and that in the caſe of Lillie againſt Riddell: for, ſatisfied that the fee could not be *in pendente*, and ſeeing that the ſettlement, if ſtrictly interpreted, muſt have reduced it to that ſtate, the Court acted with a juſt regard to the *voluntas teſtatoris*, carrying the eſtate from the teſtator to the family which he meant to favour, but rejecting the mode and condition of the ſettlement; preferring the ſubſtance to the form.

This was the principle of the deciſion in the caſe of Frog. It was then held, as it is now, that a fee cannot be *in pendente*, and upon that principle the ſettlement ſhould have been diſregarded; but the Court gave it effect. It therefore remains to ſhow, that it was upon the principle of ſupporting the *voluntas teſtatoris*,

teſtatoris, ſo far as agreeable to law, and diſregarding it in ſubordinate points, in ſo far as it was contrary to law. Let it be conſidered then, what evidence the Court had of the *voluntas teſtatoris*; and that muſt depend upon the meaning which the words of the ſettlement conveyed to the Court, as affected by the caſes which had formerly occurred.

At what period ſettlements to a perſon in liferent, and to his children *naſcituri* in fee were introduced, is not clear; but this at leaſt is certain, that the word liferent, however much it may be diſtorted from its original meaning, was a word early known in the law of Scotland, and that its legal and technical meaning was ſynonymous with its vulgar meaning; it was the uſufruct of a ſubject during a perſon's life; and this is ſtill the technical meaning of the word, unleſs in one or two very particular circumſtances. Therefore, when the firſt ſettlement to a perſon in liferent, and his children *naſcituri* in fee, came before the Court, they could have no doubts as to the *voluntas teſtatoris*. Why then did the current of the deciſions run ſo ſtrong the other way, as at laſt to compel the Court, on the ſolemn occaſion of the caſe of Frog, to give only a partial effect to ſuch a ſettlement? It was from a conviction, that ſuch a ſettlement, taken ſtrictly, was contrary to the genius and principles of the law with regard to heritable rights; and as the Court could not make the law yield to the will of the teſtator, they made the will of the teſtator ſo far yield to the law. In the caſe of Frog, therefore, they finally eſtabliſhed this principle, that as the father could not be a mere liferenter, becauſe the fee could not be *in pendente*, and as they ſaw a clear *voluntas* on the part of the teſtator, to give the eſtate to the family of the liferenter, they determined that the fee muſt be in the liferenter, as the only poſſible way of reconciling the *voluntas teſtatoris* with the law of the land. In one word, the principle of this deciſion is this: The Court ſuſtained the ſettlement to the effect of carrying the eſtate to the diſponee and his family, becauſe, in this reſpect, the will of the teſtator was conſiſtent with law: they gave the abſolute fee, and not the liferent, becauſe a liferent would have been inconſiſtent with the general principle, that a fee cannot be *in pendente*: and they gave an abſolute fee in preference to a fiduciary one, becauſe, ſince, *ex neceſſitate juris*, there was to be a fee, they could find no grounds for determining how it was to be limited, or to what extent it was to be fiduciary.

Then comes the queſtion, What change ought to be made by the words, "for his liferent-uſe allenarly?"

In the *firſt* place, Speaking either grammatically or technically, the word "allenarly" can make no difference upon the caſe; for it is an univerſal rule, that where any word or expreſſion has a preciſe taxative meaning, the addition of the words "only," or "allenarly," will not make it more ſo. As little can the addition of the words "for his liferent uſe" make any alteration on the caſe; a liferent-uſe is the uſe of the ſubject during the perſon's lifetime; and as every liferent is created for no other purpoſe, it is one of thoſe tautologies which are made uſe of by perſons whoſe anxiety is greater than their ſkill.

Secondly, Suppoſing that the uſe of theſe expreſſions ſhould indicate a greater degree of anxiety to ſend the fee to the children *naſcituri*, and conſequently to make the fee *in pendente* or fiduciary, till they do exiſt; then the creditors anſwer, that, according to the caſes of Frog and Lillie, it is not in the power

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of the teſtator to make ſuch a ſettlement. When a thing is illegal, the intention of the private party cannot ſupport it: Thus rights of an heritable nature cannot be conveyed in a deed really of a teſtamentary nature, nor would words the moſt anxious render the conveyance valid: Further, the moſt anxious expreſſions would not be allowed to defeat the law of deathbed: and many other caſes may be ſuppoſed to the ſame purpoſe.

If then the point be open as to the meaning of the word allenarly, it has been ſhown, that when added to the word liferent, it has no meaning at all; it remains therefore to ſhow, that the point is open. No deciſion has been quoted on the other ſide; nor do the creditors know that any deciſion exiſts where the Court was called upon to determine the meaning of the word allenarly, prior to the caſes of Frog and Lillie. But, ſay the other party, the reaſon of this is, that the matter never was diſputed; on the contrary, it was admitted in the caſe, Thomſon againſt Lawſon 1681, reported by Lord Stair, that if the word allenarly had been added, the import of the deed would have been different. Now, what was ſaid in that caſe was, that, "in the common ſtile of ordi-"nary nottars, conjunct fee and liferent are equiparate terms, unleſs it bear "liferent allenarly." In ſtating this, Lord Stair repeats the pleading of ſome lawyer, but neither gives his own authority, nor the authority of the Court; beſides, in that queſtion the right was to a huſband and wife; and no doubt if the right in one of them was to be reſtricted to a liferent, the word allenarly, or ſome ſimilar word, became neceſſary; but where the right is to one in liferent, and his children *naſcituri* in fee, the deſtination is already as clear as words can make it. There was therefore no ſuch meaning given to the word allenarly in the caſe of Thomſon againſt Lawſon, as that now contended for.

In the caſe of Gordon againſt Sutherland, June 8. 1748, reported by Lord Kilkerran, a ſettlement ſuch as the preſent, guarded by an inhibition, was not allowed to have effect, becauſe that would have been to render it equivalent to an entail; yet here, where there was no inhibition, that effect has been given to the ſettlement. Entails are no favourites of the law, and it has chalked out one method by which they may be rendered effectual, which is certainly ſufficient.

The next caſe is that of Douglas againſt Ainſlie, 7th July 1761, where lands were diſponed to Ainſlie in liferent, during all the days of his lifetime, and to the children procreated or to be procreated of the marriage in fee; and in another caſe, of Cuthbertſon againſt Thomſon, 1ſt March 1781, Caſſels left a ſubject to his daughter "in liferent during all the days of her lifetime, and to the "children procreated, or to be procreated, in fee." In both of theſe caſes it was found, that the fee was in the nominal liferenter. Now theſe words, "du-"ring all the days of his lifetime," either ſhow the *enixa voluntas teſtatoris* in the ſame way with the word allenarly, and the deciſions of theſe ought to have been the ſame with the preſent, or they are merely expletive, without any reference to the *voluntas teſtatoris*, and the ſame judgement ought to be pronounced here, the circumſtances being the ſame.

In the caſe of Forbes againſt Forbes, 3d Auguſt 1756, collected by Lord Kames, the

the term allenarly occurs; and although the remarks of his Lordſhip may be erroneous, it is yet a deciſion favourable for the creditors.

The import of theſe deciſions ſeems juſt to be this: When a right to an heritable ſubject is taken to a man in liferent, and to his children *naſcituri* in fee, it is fixed, that the fee is in the father; when it is taken to a man in liferent during all the days of his lifetime, and to his children *naſcituri* in fee, it has alſo been found that the fee is in the father; and when the clauſe "for his liferent-uſe allenarly," is added, it has been found, in the caſe of Forbes, to make no difference, and that the fee is ſtill in the father. But if this laſt caſe is not thought to be in point, then there is no deciſion at all on the import of the word allenarly; and this caſe ought to be decided in the ſame way with Douglas againſt Ainſlie, and Cuthbertſon againſt Thomſon.

There were two caſes ſtated, Boyd againſt Boyd, 28th June 1774, and Roſs, 8th March 1791, in both of which the fee was conveyed to perſons *nominatim*; and ſurely no perſon ever doubted, that, where an heritable right was taken to A in liferent, and to B *nominatim* in fee, the fee is in B; and what is ſaid in the laſt of theſe caſes about a fiduciary fee, muſt have been hypothetical merely, as the fiar was alive. Theſe caſes muſt therefore be thrown out of view.

It may be proper to mention, upon this occaſion, that the doctrine of the law of England is exactly the ſame with what the creditors contend for. This has been fixed in the law of England as far back as the reign of Queen Eliſabeth, by what is called the rule of Shelly's caſe, from the name of the party concerned. Indeed Mr Juſtice Blackſtone, in his argument in the late caſe of Perryn againſt Blake, traces the principle to the 18th of Edward II. The rule of Shelly's caſe, which was decided by the whole Judges of England, is, "If an "eſtate be limited to two, the one capable, the other not capable, he who "is capable ſhall take the whole. If a man gives land to one *et primogenito* "*filio*, if he has no ſon, the father takes the whole; and ſo it is if a man gives "land to a man, and to ſuch a woman as ſhall be his wife, the man takes "the whole."

The deciſions upon conveyances of moveables cannot be conſidered as at all ſettling this point either the one way or the other; at the ſame time, there is not one of them that makes againſt the arguments of the creditors. Pringle againſt Erſkine, 2d June 1714; Turnbull, 27th July 1778; Porterfield againſt Graham, 27th June 1779; Gerran againſt Alexander, 14th June 1781; Muir againſt Muir, 29th June 1786; theſe are all the deciſions which have been quoted againſt the creditors, or which they have been able to diſcover, and not one of them can be conſidered as againſt them; on the contrary, ſome of them (as that of Pringle againſt Erſkine,) are very much in their favour.

The practice next demands attention.——How that ſtands it is impoſſible preciſely to ſay; but ſurely, when, in delivering their opinions upon this caſe, two of the Judges, who had ſufficient acceſs to know the practice, differed upon the ſubject, it may be held as doubtful; and of courſe the queſtion ſhould be determined on principle, which the creditors have clearly ſhown to be in their favour. Indeed, the preſent caſe affords evidence, that the practice

of men of buſineſs cannot be ſo perfectly clear as ſome of the Judges ſeemed to ſuppoſe, for Lieutenant Newlands obtained L. 1200 on heritable bonds, which ſhows that, in the opinion of ſome men of buſineſs, he was conſidered as abſolute and unlimited fiar of the ſubject.

ARGUMENT for JOHN NEWLANDS, the FIAR.

The mode of arguing adopted by the creditors is, firſt to attack the poſſibility of the exiſtence of a fiduciary fee, on account of the ſuppoſed inconveniencies attending it, and the ſilence of the law with reſpect to the powers which it beſtows; and then, aſſuming it as proved that a fee cannot be *in pendente*, they argue, that, in the caſe of Frog and others, the deed muſt either have been ſet aſide *in toto*, as there was no perſon capable of taking the fee; or, if the deed was ſuſtained, there was a *neceſſitas legis* for aſcribing an unlimited fee to the donee of the liferent. However ingenious, nothing can be more falſe than this argument. The premiſes will afterwards be conſidered; but admitting that a fee cannot be *in pendente*, and that a fiduciary fee is unknown or inextricable, it will never follow that the fee ought to be given to a perſon to whom no more than a mere liferent was intended: All that the Court can do is, to ſuſtain the grant of the liferent, leaving the fee to be taken up by the heir *alioqui ſucceſſurus*.

And upon the ſame hypotheſis, there is no neceſſity to attribute to the liferenter, or to the heir *alioqui ſucceſſurus*, an unlimited fee, and certainly not a fee which could endure one moment after the exiſtence of the donees *naſciturí*. But the conſtructive fees raiſed up in favour of the grantees of a liferent, by the deciſions in the caſe of Frog and others, are not conditional nor temporary fees; they are fees attended with a *jus libere diſponendi*, and conſequently do not ariſe from any *neceſſitas legis*; if ſo, there is no other principle for it but the ſuppoſed will of the teſtator; and therefore the opinion of a learned Judge, preſerved by the Faculty Collector, in the caſe of Gerran againſt Alexander, (June 14. 1781.) ſtands upon grounds that are not to be removed.—"The Lord Reporter obſerved, That, by many deciſions, it had "been found that the fee was really in the parents, though the deſtination bore "only a liferent to them, and a fee to their children; but that this was not "*ex neceſſitate*, as had ſometimes been ſuppoſed, leſt the fee ſhould be *in pen*-"*dente*. It was upon the preſumed will of the granter, who only meant a "*ſpes ſucceſſionis* to be in the children; and therefore whenever there ap-"peared to be intended a right of property in the children, the parents right "was either limited to a mere liferent, or conſidered as a truſt-fee, which "could not defeat it." It is then plain, that the whole of the laboured argument of the creditors, founded on the deciſions in the caſe of Frog, &c. falls to the ground, and that the fiar is at full liberty to trace the genuine principles of conſtruction upon which the Court has proceeded in interpreting grants like the one in queſtion.

It appears, from Preſident Balfour, (p. 103. § 5.), that the annuities from lands deſtined as jointures to widows were conferred as conjunct fees, and that, upon the death of the huſband, though the fee was confined to the liferent-uſe of the widow, who could not diſappoint the ſucceſſion of the heir, ſhe poſſeſſed

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all the advantages belonging to a fiar; and it appears, from the ſtatute 1535, c. 16. that even then it was neceſſary to order the widow to find caution not to commit waſte upon the lands that fell in ward.

The means by which theſe conjunct fiars were reſtrained from alienation appear from Lord Stair, where ſeveral caſes are mentioned, in which the words are interpreted in conformity with what was really *actum et tractatum* betwixt the parties; and hence he lays it down, that the main difference betwixt conjunct fees and other liferents is, that "the conjunct fiar being, by interpretation, liferenter only, may not alienate or waſte." The reſtraint therefore plainly aroſe from courts following out the intention of the parties; and accordingly, Craig takes notice, that, in his time, the conjunct fee was conſidered as a ſimple liferent: "Matris conjuncta infeudatio, antea impedimentum erat "ne filius poſſet adire ſuperioritatem: hodie non eſt; nam conjuncta inveſtitura hodie in nudum uſumfructum reſolvitur." This much is certain, that the terms of conjunct fee and liferent then remained, and ſtill continue in uſe, in creating proviſions in marriage-contracts upon wives: and it appears, from the caſe of Thomſons againſt Lawſons, that, from the remoteſt times, the intention of the parties was conſidered as the ſovereign rule; for there, the Court, by a conſtruction of intention, held, that a grant of property was made by a diſpoſition to a perſon "in liferent, and to the heirs of his body;" and it was allowed, that if the term, "allenarly," had been added to the words, "in "liferent," a different rule of conſtruction would have been followed; and that the ordinary ſtyle of notaries authoriſed the diſtinction.

The ſame diſtinction in the practice of conveyancers is to be found in the caſe of Frog, decided in the year 1735. In that caſe, Bethia Dundas "diſponed, "from her heirs, and all others her aſſignees, to and in favour of Robert Frog, "her eldeſt grandſon, in liferent, and to the heirs to be procreated of his body "in fee;" and failing him without heirs of his body, to another grandſon, alſo in liferent, and to the heirs of his body in fee; and failing them, to a ſecond ſon of her own, &c.; whom all failing, to her own neareſt heirs. Robert Frog was infeft; and afterwards ſold and burdened the ſubjects: and the purchaſer objecting to the title, the Court, at firſt, found, that Robert was only a liferenter; but by a ſubſequent judgement, they found, that he was fiar. The caſe was argued for the fiar by Mr Ferguſon, afterwards Lord Pitfour; and he there takes notice, "that parents taking rights to themſelves, or others "ſettling them upon them, with ſubſtitutions to their children, have promiſcuouſly made uſe of the words, fee, conjunct fee, or liferent;" and that the word liferent was underſtood to import, when provided to the parent, a *uſusfructus cauſalis*, and reſolved into a real fee. He quotes the caſe of Thomſons againſt Lawſons, and tranſcribes the paſſage with regard to the word "allenarly;" and afterwards, in arguing the queſtion as a queſtion of intention, he obſerves, that if it had been meant to reſtrain Robert Frog to a liferent, it is impoſſible that the granter "ſhould not have expreſſed clearly what ſhe "meant, and not ſo much as added the word allenarly, without which, by "the deciſions, liferent, in ſuch caſes, imports an *uſusfructus cauſalis*: the "thing is plain, no reſtriction was intended, elſe it had been expreſſed. The "clauſes of liferent and fee, which raiſe all the difficulty, are only part of the

"writer's

" writer's ſtyle, and that an uſual ſtyle, and approven of by the Court in other " caſes." And again he aſks, Whether the legal import of fee be not as diſtinct and certain as that of liferent? yet a conjunct fee granted to a wife, it is now univerſally eſtabliſhed, imports no proper fee, but a liferent only. *Verba valent uſu*, &c.

In ſtating the caſe, Lillie againſt Riddel, where the Court found a ſon to be fiar, though *ex figura verborum* he had only the liferent, Lord Kilkerran takes notice of the opinions entertained by the Court in deciding the caſe of Frog. He ſays, " That a bill reclaiming againſt the Lord Ordinary's interlocutor was " refuſed without anſwers; many of the Court at the ſame time declaring, as " likewiſe had been done in the ſaid caſe of Frog, that, but for the courſe of de- " ciſions, they ſhould have been of opinion, that the ſon was not fiar, but fi- " duciary for his children." So that, far from conſidering a fiduciary fee as inextricable, or unknown in the law of Scotland, the Court would have had recourſe to it for effectuating the will of the granter, if a majority, moved by a courſe of deciſions, had not attributed a proper fee to the grantee of the liferent.

In the caſe of Alexander Roſs againſt his children, decided 8th March 1791, a diſpoſition was made by Irvine of Pitmuckſtone, " to and in favour of Eliſabeth, " Jean, and Ann Irvines, his daughters, equally amongſt them, in liferent during " all the days of their lives, but for their liferent-uſe allenary, and after their " deaths, to and in favour of Alexander" &c. (grandchildren of the daughters then in exiſtence): the proviſion with reſpect to the rents concludes thus: " That " immediately after the death of the laſt of my ſaid daughters, all my grandchildren " by my ſaid three daughters, already procreated, or who ſhall happen hereafter " to be procreated of their bodies, ſhall ſucceed and have full right and title to " the lands above diſponed, equally amongſt them, and *ſecundum capita*." The three daughters, after poſſeſſing the eſtate for ſome years, made up a title by precept of *Clare conſtat* as heirs-portioners of line; but upon the death of one of them, the grandchildren of the other two brought a reduction againſt the grandchildren of the daughter deceaſed. Lord Dreghorn, before whom the queſtion came, found, " That as the right conferred on the daughters by the " ſaid ſettlement was in liferent, during all the days of their lives, but for their " liferent uſe allenarly, it is plain, that the granter did not intend that they " ſhould have any proprietory powers over the ſubjects, and that the words, " after their deaths, which occur in the diſpoſition of the fee, were not meant " to ſuſpend the right of the grandchildren as to the fee, but only as to the " rents till the death of the daughters: And further, That ſuppoſing theſe " words to have the effect of veſting *ex neceſſitate* the fee in the daughters, " ſuch fee would only be fiduciary, and conſequently not ſufficient to enable " them to charge the ſubjects with debts or ſecurities: Finds, That the " daughters could not with effect neglect ſaid ſettlement, and ſerve heirs-por- " tioners *ab inteſtato* to their father: Therefore reduces the ſervice, and o- " ther titles expede by them, as ſuch; and finds, that they muſt purge what " heritable debts or ſecurities they have brought upon the eſtate; and de-

" cerns."

"cerns." And to this judgement the Court adhered, by refuſing a reclaiming petition without anſwers.

The creditors ſay, that ſome of the grandchildren being named, it puts it out of doubt that the fee was conveyed to them. But as the eſtate was to be divided amongſt the grandchildren *in capita*, as they exiſted at the death of the daughters, the creditors would do well to conſider what ſpecies of fee it is that they thus aſcribe to the grandchildren; for they will not pretend to ſay, that it was a fee which would have enabled the creditors of the liar to have carried off the ſubject during the lives of the mothers, the eſtate being conveyed expreſsly to the grandchildren alive at the death of the liferenters; but if it be not an unlimited fee, it muſt be a fiduciary one, and thus they muſt give up at once their laboured argument againſt fiduciary fees.

But this caſe eſtabliſhes a more material fact, as it ſhows, that ſo late as the 1791, the Court found, that a diſpoſition to a parent in liferent, and to the children in fee, qualified by the word allenarly, received the ſame conſtruction which would have been given to it by the Court at the time of Stair's collection; and it will be conſidered how far it is now poſſible to adopt a rule of conſtruction different from that which has prevailed from the earlieſt period of our laws, and whether a departure from ſuch a conſtruction would not be an act of palpable injuſtice to every perſon who holds property by deeds framed while the former conſtruction remained unqueſtioned.

The creditors, aware of the force of this inference, endeavour to found on the caſe of Forbes, preſerved in Kames's Select Deciſions; though, at the hearing, it was ſhown, that the ſtatement given by his Lordſhip was defective in very important particulars, and after an examination of the ſeſſion-papers, it was held by the whole Judges, as foreign to the queſtion relative to the influence of the word allenarly *. The true queſtion at iſſue in that caſe was, whether John had acquired a valid right to the conveyance in Iſabel's marriage-contract, or, in other words, whether Janet his mother was *in titulo* to diſpone,

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* The following are the circumſtances of this caſe, as appearing from the printed papers, and given by Mr Maconochie in the preſent pleading.

Iſabel Gordon, in her contract of marriage with Alexander Crombie, diſponed a ſubject, in which ſhe ſtood infeft, "to herſelf and the ſaid Alexander Crombie, and the longeſt liver, in "liferent, for their liferent uſes allenarly, and to the heirs that ſhould be procreated of the mar-"riage; whom failing, to Iſabel's heirs of any other marriage; whom failing, to Janet, and "the heirs of her body; whom failing, to the ſaid Iſabel Gordon, her other heirs whomſoever; "with this condition, that it ſhall no wiſe be lawful to, nor in the power of the ſaid Iſabel "Gordon and Alexander Crombie, both, or either of them, to ſell or diſpoſe upon the juſt and "equal half of the ſaid tenement, nor any wife to burden or affect the ſame, nor to do any "deed whereby the juſt and equal half of the tenement of land, and others above diſponed, "and the fee of the ſame, (conceived in favour of the children to be procreated of the ſaid Iſabel "Gordon her body, of this or any ſubſequent marriage, whom failing, in favour of the ſaid "Janet Gordon, and the heirs of her body,) can be any wiſe burdened, affected, altered, inno-"vated, or prejudged." Iſabel and her huſband died without iſſue; and Janet, without making up any title, diſponed the ſubject to her younger ſon John, and died. George, her eldeſt ſon, obtained himſelf cognoſced as heir in ſpecial to Iſabel the diſponee, and having taken infeft-

ment,

and this depended again upon the point of law, Whether a *nominatim* ſubſtitute has a right to the benefit of a conveyance, without aſcertaining by ſervice, or at leaſt by a declarator, the fact of a devolution? this point occurred in the noted caſe of Carleton, 12th February 1748, in which the Court held a ſervice to be neceſſary; and upon the footing of that caſe, the fee remained with Iſabel Gordon during her life, in her character of diſponer, there being no perſon intitled to take inteſtment of fee upon the diſpoſition, ſo long as heirs of her body were in legal poſſibility; of conſequence, as the fee was *in hæreditate jacente* of Iſabel, it was neceſſary that Janet ſhould have ſerved heir to her, either of line or of proviſion, in order to carry the fee, and be *in titulo* to convey it. The caſe of Forbes, therefore, affords not the ſhadow of an argument in favour of the creditors.

Upon this point the fiar ſubmitted, as the reſult of his deduction, that a conveyance to a perſon in liferent, for his liferent uſe allenarly, and to the perſons procreated, or to be procreated, in fee, tranſmits only a liferent to the *nominatim* grantee; while a grant conceived ſimply to a perſon in liferent, and to perſons not named, procreated or to be procreated, in fee, is held to convey an unlimited fee to the perſon named, and to thoſe in the deſtination a mere hope of ſucceſſion; and that this rule, of ſo ancient a date, and invariably adhered to as far back as the hiſtory of our law reaches, the Court ought not now to depart from.

But the creditors urge, that this rule of conſtruction ought to be abandoned, becauſe it lays the Court under the neceſſity of eſtabliſhing fiduciary fees, which are an abſurdity. Still the fiar muſt be allowed to think that they are not neceſſary, or, were they ſo, that they are no abſurdity.

The ſuppoſed *neceſſitas juris* for raiſing a fee of ſome ſort, is founded on the maxim, that a fee cannot be *in pendente*. But if by this is meant, that there muſt be ſome perſon who has a right of making up titles as fiar, it is denied that any *neceſſitas juris* for raiſing conſtructive fees is deducible from that maxim. If, on the other hand, it is meant, that, by the common law of Scotland, there muſt always be ſome perſon *in titulo* to hold the entire fee, and that the property will be affected by ſuch perſon's acts and deeds, then the maxim is denied. There are no proper *neceſſarii hæredes* with us; even in the ſtate of apparency, the greater part of the powers of ownerſhip are ſuſpended, and in ſome ſenſe *in pendente*. The diſponee may decline to accept, and the heir may repudiate; and when the heir repudiates, the next heir cannot ſerve. Where then is the fee? In one ſenſe, it is *in pendente*, as there is no power in the law to create a property in any perſon during the life of the heir repudiating, without acquiring right from him by ſome act or deed of his. Again, the ſuperior is not to be defrauded by this conduct, of his rights of ſuperiority; and the law gives him the caſualty of nonentry for his indemnification. But though the ſuperior get poſſeſſion by declarator of nonentry, he does not become owner of the *dominium utile*, although he were to poſſeſs for more

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ment he inſiſted in an action of maills and duties. The tenants then raiſed a multiple poinding, and Lord Kames, before whom the queſtion came, pronounced a judgement, preferring George to the rents; and to this judgement the Court unanimouſly adhered.

than

than the years of preſcription: Here, therefore, there is a fee *in pendente*; and caſes happen where heirs find it out of their power to enter, as, for inſtance, when they would incur an irritancy of a more valuable property.

A clauſe, declaring that an heir exiſting ſhall not enter during the poſſibility of a nearer heir in expectancy, will be effectual. The deciſions varied upon this point where there was no expreſs will, till the caſe of Sir George Mackenzie of Roſehall in the 1708, when it was fixed in favour of the heir in exiſtence, excepting when the will of the teſtator ſhould direct it otherwiſe; and the inference is, that, in the law of Scotland, the fee may be ſubſtantially pendent, though, in another ſenſe, it may, to a certain degree, be held to be otherwiſe. Lord Stair ſays, "that the fee muſt neceſſarily belong to ſome "perſon: it cannot hang in the air on a future poſſibility;" by which undoubtedly is meant that there muſt be a *jus dilatum* to ſome perſon, who however, may take up the ſucceſſion or not as he pleaſes; the law being ſatisfied with ſetting up a perſon who is ſufficiently *in titulo*, for the ſake of third parties. In the caſe of Frog, the maxim is made to ariſe, 1. From the neceſſity of finding a vaſſal; 2. From enabling creditors to affect the eſtate; 3. From the danger of the fee becoming caduciary. The laſt of theſe evils is merely imaginary. It is impoſſible that fiars *in ſpe* can be infeft, ſo as to diveſt the anceſtor; and as to the other hazards, the law ſatisfies the ſuperior, for his vaſſal, if a liferenter is entered; if not, he has his nonentry; and creditors again may always attach the eſtate, by directing charges againſt the heir *alioqui ſucceſſurus*.

If the fiar be right in this deduction, the creditors have not the ſhadow of a cauſe; for the caſe comes ſimply to this, The will of the teſtator to grant a mere liferent to Lieutenant Newlands is not diſputable; and this grant will be valid; and the grant of the fee to his children in expectancy will alſo be valid, without aſcribing an intermediate fee to Lieutenant Newlands. The fee, till the exiſtence of theſe heirs, according to the caſes of Carleton and Forbes, remains with the diſponer, and in his *hæreditas jacens*, or in the heir *alioqui ſucceſſurus*, till the fiars in expectancy exiſt; and here the fiars in expectancy exiſt, and are entitled to take up the fee from the *hæreditas jacens* of the diſponer.

The creditors may no doubt maintain, that, upon theſe principles, there would be room for the creditors of the heir *alioqui ſucceſſurus* to carry off the property before the birth of the fiars in expectancy. And granting this were the caſe, the other party has nothing to do with it. But were the fee left deſcendible as the law directs, it would be ſafer for the expectant fiars, than to place it in the liferenter; in the former caſe, the liferenter, who is commonly nearly connected with the fiar, would have an intereſt to protect the right of the fiar; whereas, in the latter caſe, the fee being in the liferenter, there is no perſon whoſe duty it would be to attend to the intereſt of the heir in expectancy.

The doctrine, that fiduciary fees are inextricable, and unknown in the law of Scotland, will not, however, be readily adopted. The Roman law, one of the great fountains of ours, admitted fiduciary fees: when a ſucceſſion opened where there was a nearer heir *in ſpe*, the exiſting heir was held to be merely a *fiduciarius* for the heir expected; l. *penult.* *et* l. *ult.* *Cod. Commun. de Legatis.*

Legatis. And in the law both of this and of our ſiſter kingdom, fiduciary fees are a conſtant reſource for accompliſhing the wills of parties.

But the fiar does not mean to ſay that the powers of a fiduciary fiar are attended with the powers uſually given to expreſs truſts. A fiduciary fee is the mere fiction of law, deriving no power from the grant of the teſtator, but merely having ſuch a character as courts of juſtice find it neceſſary to attribute to it, in order to carry into effect the will of the teſtator, agreeably to principles of law. Were a court to act otherwiſe, it would diſpoſe of the teſtator's property without his conſent, and take it from the perſon to whom he had deſtined it to go. To adopt a fiction for the ends of juſtice is perfectly competent; and if the Court are of opinion that it is proper to conſider Lieutenant Newlands as a fiduciary fiar, the real fiar has no intereſt to oppoſe it, for he does not conceive that that character is attended with any right of adminiſtration.

Upon the whole, the rule of conſtruction which has ſo long and ſo invariably been obſerved in this country, ought to be followed.

Upon adviſing the petition and anſwers, there was no new reaſoning uſed by the Judges. Several of their Lordſhips fixed their opinion in favour of the judgement upon the term allenarly: And, on the other ſide, it was held, as formerly, to be a principal conſideration, that a fee being admitted to be neceſſarily veſted in the liferenter, that fee was attachable by his creditors, and affectable by his deeds.

State of the vote: Adhere, or Alter—

Adhere, Lords Juſtice-Clerk, Liſkgrove, Swinton, Dreghorn, Polkemmet, Monboddo, Ankerville, Dunſinnan, Abercromby, Craig.

Alter, Lords Stonefield, Henderland, Methven. The opinion of the Lord Preſident was againſt the judgement.

For the Fiar, G. Ferguſſon. A. Maconochie, & C. Hay, } Adv. K. Mackenzie, C.S. }
Creditors, Mr Solicitor, C. Hope, & Ja. Turnbull, } J. Peat, } Ag.
Inner Houſe. Sinclair, Clerk

N° XXIX. Lieutenant THOMAS THOMSON of Northſteelend, Purſuer,

AGAINST

KATHARINE and ELISABETH THOMSON, Daughters of the deceaſed William Thomſon of Northſteelend, &c. Defenders.

THIS queſtion turns upon the ſame point with the former. The deceaſed William Thomſon, father to the purſuer and defenders, executed a deed conveying the lands of Northſteelend to his ſon Thomas Thomſon the purſuer, "in liferent, for his liferent uſe only, and the heirs of his body in fee, whom "failing, to the defenders, for their liferent uſe only, and to their children in fee." Thomas, with a view either to ſell or to alter the deſtination, brought a declaratory action for having it found that he was fiar of the lands under this conveyance; and the cauſe having come before the Lord Juſtice-Clerk, as Ordinary,

nary, his Lordſhip "ſuſtained the defence, abſoilzied the defenders, and found "them intitled to the full expence of extracting the decreet of abſolvitor."

This queſtion coming before the Court at the ſame time with that of Newlands, the hearing referred to both cauſes; and upon adviſing this cauſe, the Court, both at the hearing and to day, adhered to the judgement of the Lord Ordinary.

For the Purſuer, Ja. Turnbull, Advocate. Ad. Rolland, C. S. Agents.
Defender, A. Maconochie, Advocate. John Moir, C. S. Agents.
Lord Juſtice-Clerk, Ordinary. Pringle, Clerk.

N° XXX. JAMES HUNTER, only Child of the Marriage betwixt Andrew Hunter and Euphemia Muir, Purſuer,

AGAINST

The TRUSTEE on the Sequeſtrated Eſtates of ANDREW HUNTER and Company, Merchants in Leith.

THE queſtion decided in this cauſe, was, Whether certain heritable ſubjects conveyed by the purſuer's mother in her contract of marriage, were conveyed to her huſband, ſo as to give him the fee, or only the liferent of them. The contract proceeds upon this preamble, That it was agreed betwixt the parties, "that the firſt deceaſer of them two ſhall make over to the ſurvivor "in liferent, and the child or children procreated or to be procreated betwixt "them in fee, his or her real and perſonal ſubjects." The clauſe conveying the huſband's heritage is, "to and in favour of his ſaid ſpouſe, for her liferent "during all the days ſhe ſhall ſurvive him, and the children of the marriage "procreate betwixt them in fee." But the clauſe conveying the wife's heritable property is expreſſed in theſe terms: "For the which cauſes, and on the "other part, ſhe the ſaid Euphemia Muir, for the love and affection which ſhe "has for her ſaid huſband, and for obviating all diſputes and differences that "might happen after her death, in the event of her predeceaſing him, betwixt "him and her neareſt heirs and executors, by theſe preſents, gives, grants, and "diſpones, to and in favour of her ſaid huſband, and the children procreated "betwixt him and her, which failing, to the ſaid Andrew Hunter, and his near-"eſt heirs and aſſignees whomſoever, heritably and irredeemably, all and "whole," &c.

The father was infeft in the wife's heritable property on the precept of ſeiſin contained in the contract; but he had granted no ſecurities over it, nor had it been attached by his creditors. In the year 1793 the company failed in which the father was engaged; and the purſuer, who was the only child of the marriage, was adviſed to bring an action for having it declared, that the right of Andrew Hunter, his father, was only that of a liferenter; or, if it ſhould be held to be a fee, for reducing the contract and infeftment, as proceeding upon an error, or upon fraud.

The Lord Monboddo, before whom this action came as Ordinary, pronounced a judgement, "Repelling the reaſons of reduction, abſoilzieing the de-"fender, and decerning." By this judgement the right of the father was held to be a fee; but the cauſe being this day brought into the roll by the Lord Preſident,

fident, from its connection with the principle upon which the two preceding caſes would be decided, the Court were unanimouſly of opinion, that the right of the father was no more than that of a liferenter, and that the fee was veſted in the purſuer.

The Court, in deciding this cauſe, conſidered it as differing from the preceding caſes in this reſpect, that in thoſe the diſpoſitions were pure, and the right given in words *de præſenti*; in this the conveyance was conditional, depending on the predeceaſe of the wife. But the queſtion principally depends on the conſtruction to be given to the diſpoſitive words, which are, "to and in "favour of her ſaid huſband, and the children procreated betwixt him and "her, whom failing;" and theſe words muſt be underſtood either to give a liferent to the huſband, and a fee to the child, or the huſband and child muſt be held to be joint diſponees: In judging whether the one or the other of theſe interpretations ought to be given, it is fair to take the whole deed into view; and the narrative of this contract ſhows, that it was the intention of the parties to give a liferent only to the ſurviving parent, and a fee to the children; the diſpoſitive words therefore which have been uſed in this caſe, muſt be underſtood to mean a liferent in the father, and a fee in the child.

For the Purſuer, Mat. Roſs, } Adv. James Young, } Agents.
Defender, Allan Maconochie, } John Gray, }
Lord Monboddo, Ordinary. Home, Clerk.

July 10, 1794.

N° XXXI. ELPHINGSTON BALFOUR, Bookſeller in Edinburgh,

AGAINST

THOMAS RUDDIMAN, Printer in Edinburgh.

AN edition of the Acts of Sederunt of the Court of Seſſion down to the 1790, having been prepared under the authority of the Court, accompanied with a very uſeful index, compiled by the late Mr Tait, Clerk of Seſſion, Mr Balfour purchaſed the copy-right, and printed the work at a conſiderable expence. Mr Ruddiman, finding that this work had not been entered at Stationers Hall, and was a work which, properly ſpeaking, could not be conſidered as literary property, publiſhed an abridgement of it; upon which a fiſt was applied for by Mr Balfour, on this ground, that it is a right inherent in the Court, conſiſtent with its dignity, and beneficial for the country, that its acts ſhould be publiſhed under its own authority; and that this was conſiſtent with the former practice.

The Court granted an interdict againſt Mr Ruddiman's publication.

For Mr Balfour, John Clerk, } Adv. James Gibſon, C. S. } Agents.
Mr Ruddiman, Cha. Hope, } Bayn Whyte, C. S. }
Inner-Houſe. Bill-Chamber.